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Isaac Smith

Keeps His Seat

On the 29th [illegible] 1852

Daniel Christman's Book

May 12th 1856

Magistrates Assistant

by the Hon. Henry Coulman

one of the United States Senators

for the Middle State District

THE

Magistrates' Assistant;

BEING

AN ALPHABETICAL ILLUSTRATION

OF SUNDRY

LEGAL PRINCIPLES

AND

USAGES,

ACCOMPANIED WITH A VARIETY OF

NECESSARY

FORMS.

COMPILED FOR THE USE OF

THE JUSTICES OF THE PEACE,

IN THE MISSISSIPPI TERRITORY,

BY THE HONORABLE

HARRY TOULMIN,

ONE OF THE UNITED STATES' JUDGES FOR

THE TERRITORY AFORESAID.

PUBLISHED BY AUTHORITY.

NATCHEZ:

PRINTED BY SAMUEL TERRELL,

PRINTER TO THE MISSISSIPPI TERRITORY.

1807.

Daniel Ellerington's Book

Law
Office
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J. H. 36

THE MAGISTRATES' ASSISTANT.

ACCESSARIES.

AN *Accessary is he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.*

In the highest capital offence, namely, high treason, there are not, according to the English law, any accessaries, either before or after; for the consenters, aiders, abettors, and knowing receivers and comforters of traitors, are all principals...1 *Hale's Hist.* 613. It may be doubted, however, whether this doctrine be applicable under the limited definition of treason, adopted by the constitution of the United States.

In cases that are criminal, but not capital at the common law, as in *petit larceny* and *trespass*, there are no accessaries; for the accessaries *before*, are in the same degree as principals.

I. *Of accessaries before the fact.*

An accessary before the fact committed, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.

If he is present he is not an accessary, but a principal.

Those offences, which in the construction of law, are sudden and unpremeditated, cannot have any accessaries before—as killing a man by misadventure, or in his own defence, or manslaughter; for

In such case, there can be no procuring, counselling, commanding, or abetting; but there may be accessaries after.—*H. H.* 616.

II. *Of accessaries after the fact.*

An accessary after the fact is, he who knowing the felony to be committed by another, relieves, comforts, or assists the felon.

Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessary to the felony; and where one assists him with a horse to ride away with, or with money or victuals to support him in his escape—2 *Hawkins*, 317.

But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessary, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned—*Hale's History*, 618.

If a man hath goods stolen, and he receives his goods again, simply, without any contract to favor the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessary; but if he take money of him to favor him, whereby he escapes, this makes him accessary—1 *H. H.* 619.

The accessary may be put to answer before the principal hath appeared: but his plea cannot be tried before such appearance, unless he desires it himself: but if he will put himself upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good—2 *Haw.* 322. 1 *H. H.* 623.

But it seemeth necessary in such case, to respite judgment, till the principal be convicted.

AFFRAY.

I. *What is an affray.*

AN *affray is a public offence, to the terror of the people; so called because it affrighteth and maketh men afraid*—3 Coke's Institutes, 158.

But no quarrelsome or threatening words whatsoever, will amount to an affray; and no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him, before a justice in order to find sureties—1 *Haw.* 135.

Also, it is certain, that it is a very high offence to challenge another, either by word or letter to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight: as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight—1 *Haw.* 135.

But although no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people.

II. *How it may be suppressed.*

Any one who sees another fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable to be

carried before a justice, to find sureties for the peace—1 *Haw.* 136.

If a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over; and also afterwards detain him till he find such surety by obligation.

If an affray be in an house, the constables may break open the doors to preserve the peace; and if affrayers fly to an house, and he follow with fresh suit, he may break open the doors to take them.

But it is said, that a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it.—1 *Haw.* 137.

A justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable are either enabled or required by the law to do; but it is said, that he cannot without a warrant authorise the arrest of any person for an affray out of his own view: yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace—1 *Haw.* 137.

All affrays in general are punishable by fine and imprisonment.

WARRANT TO APPREHEND AFFRAYERS.

Washington, } The Mississippi Territory of the United States, to the constable of

Whereas A. I. of

yeoman, hath this day made oath before J. P. esq. one of the justices of the peace for the said county, that on the day of , in the year of our Lord ; A. O. of , yeoman; and B. O. of , yeoman, at ; in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them, the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A I.: these are therefore to command you forthwith, to apprehend the said A. O. and B. O. and bring them before the said J. P. or some other of the justices of the peace for the said county; to answer the premises, and to find sureties, as well for their personal appearance at the next court, to be holden for the said county; then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence; as also for their keeping the peace in the mean time, towards us, and all our people; and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under the hand and seal of the said J. P. at ; in the said county, the day of in the year

ARREST.

THIS is to be understood principally of arrests in criminal cases only; though we shall occasionally make some observations with regard to arrests in civil cases.

An arrest signifies in law the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of

the law; and it may be called the beginning of imprisonment—*Lamb.* 93.

Concerning which I will shew,

I. *Who may, or may not be arrested.*
II. *For what causes of suspicion an arrest may be.*
III. *By whom the arrest shall be made.*
IV. *The manner of an arrest.*
V. *What is to be done after the arrest.*

I. *Who may or may not be arrested.*

In England a member of parliament has the privilege of parliament to be freed from arrests: and a similar privilege is extended to members of the legislature, by some of the American constitutions; but for treason, felony, and breach of the peace, there can be no privilege—4 *Inst.* 24, 25.

In cases of corporations, the process is a distringas, for they cannot be arrested—3 *Salk.* 46.

In the case of *K.* and *Woodham*, *H.* 2. *G.* 2. upon a motion for an information against the defendant, who was a justice of the peace; it was held that a person in execution in the king's bench may be there charged criminally by a justice of the peace's warrant: but that no such justice can take a prisoner of that court out of the custody of the court, and send him to the county gaol—*Str.* 825.

No non-commissioned officer or soldier of the troops of the United States, can be arrested or subject to arrest for any debt under the sum of twenty dollars: but this does not extend to criminal offenders, but the commanding officer is to aid the officer of justice in apprehending and securing the person accused—(Laws of the U. S. v. 3. 354. v. 8. 45.

II. *For what causes of suspicion an arrest may be.*

From the tenor of all the old books, it seems probable that by the ancient common law, any private person might of his own authority justify both an arrest and commitment for treason or felony on a reasonable cause of suspicion—(2 Hawk. 192. Leach. Dub. Ed.)

The causes of suspicion, which are generally agreed to justify a private person in arresting, or a justice in issuing a warrant for the arrest of even an innocent person for felony, are these that follow:

The common fame of the country; but it seems that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground.

The being found in such circumstances, as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them.

The behaving one's self in such a manner as betrays a consciousnes of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond.

The being found in company with one known to be an offender, at the time of the offence, or generally at other times, keeping company with persons of scandalous reputation.

The living an idle, vagrant, and disorderly life, without having any visible means to support it.

The being pursued by hue and cry—2 *Hawkins*, 119.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious,

unknown, nor indicted; he may be attached and imprisoned by the law of the land—2 *Inst.* 52.

But generally no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry—2 *Haw.* 120.

In the case of *Samuel* against *Payne*, and others; the plaintiff *Samuel* brought an action of trespass and false imprisonment against *Payne*, a constable and two others—The facts were these: *Hall*, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search warrant was granted by a justice upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found: however, *Payne*, *Hall*, and the other defendant, an assistant of *Payne*, arrested the plaintiff and carried him before a magistrate, who upon examination discharged him. The cause was tried before lord *Mansfield*, and a verdict found against all the three defendants. At the trial, his lordship, and the counsel on both sides, looked upon the rule of law to be, that if a felony hath actually been committed, any man, upon reasonable, probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate: but that, if no felony has been committed, the apprehending of a person suspected, cannot be justified by any one. His lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however, was considered as inconvenient and narrow, because if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril, exercise his judgment on

the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorised to examine, and commit, or discharge. On this ground a motion was made for a new trial; and after cause shewn, the court held, that the charge was a sufficient justification to the constable and his assistant, and the rule for a new trial was made absolute. Which new trial came on before lord Mansfield at the sittings after this term; when a verdict was found against Hall, and for the other two defendants—*Douglas*, 345.

III. *By whom the arrest shall be made.*

In criminal cases a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect.

Also every private person is bound to assist an officer demanding his help for the taking of a felon, or the suppressing of an affray—2 *Haw.* 115, 6.

It is holden by some that any private person may by the common law arrest a suspicious night walker, and detain him till he make it appear that he is a person of good reputation:—and it has been adjudged that any one may apprehend a common notorious cheat, going about the country with false dice, and being *actually caught playing with them*, in order to have him before a justice of the peace: for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an

opportunity of escaping. The same reason seems to apply to the case of other offences in like manner scandalous and prejudicial to the public—2 *Hawk.* 122. 130. *Cro. Car.* 234.

A constable may by virtue of his office arrest a breaker of the peace in his view, and keep him in his house or in the stocks, till he can bring him before a justice—1 *H. H.* 587.

Or any person whatsoever, if an affray be made to the breach of the peace, may without any warrant from a magistrate, restrain any of the offenders, to the end that the public peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant—2 *Institutes*, 52.

As to the interference of *military* officers, whether of the regular troops or of the Militia, it shall be considered at large, at the close of this article.

So much concerning an arrest without a warrant; next follows arresting with such warrant;

The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it—1 *H. H.* 581.

If it be directed to the sheriff, he may command his bailiff, under sheriff, or other sworn and known officer to serve it, without writing any precept.—But if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise false imprisonment will lie. *Lamb.* 89.

But every other person to whom it is directed, must personally execute it: yet it seems, that any one may lawfully assist him—2 *Haw.* 137.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts; and not to one of them to execute it within the dis-

trict of another; but if it be directed to a particular constable, (Mr. Hawkins says, to a particular constable *by name*) he may execute it any where within the jurisdiction of the justice; but is not compellable to execute it out of his own constablewick—*Lord Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 137.

The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good; but he is not compellable to execute it unless he be a proper officer—*H. H.* 581.

But by the justices oath of office, the warrant ought not to be directed to the party, but to some indifferent person to execute it.

If a warrant is directed to two or more jointly, yet any one of them alone may execute it—*Dalt. c.* 169.

IV. *The manner of an arrest.*

The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant—*Dalt. c.* 169.

It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason, or felony; and it is a doctrine of the common law that a person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessary to the felony—2. *Haw.* 188.

An arrest in the night is good, both at the suit of the commonwealth and of a private citizen, else the party may escape—2 *Co.* 66.

By the act to provide for the more effectual administration of justice, constables and others may, on having the warrant endorsed by a justice in another county, into which an offender shall have

escaped, arrest an offender in such other county, and carry him back again before a justice in the county from whence the warrant first issued.

A private person cannot raise power to arrest or detain a felon—*H. H.* 601.

But any justice, or the sheriff (without making application to any militia officer, who as such hath no authority in the case) may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb the public peace; and every man being required, ought to assist and aid them, on pain of fine and imprisonment—*Dalt. c.* 171.

But it is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without a just cause—*Dalt. c.* 171.

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command, and ought to have the aid and attendance of all gentlemen, yeomen, husbandmen, labourers, tradesmen, servants and apprentices; and of all other persons being above the age of fifteen years, and able to travel.

But women, and such persons as are decrepit, or diseased, shall not be compelled to attend them.

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them; and how and after what manner they shall be armed, or otherwise furnished—*Dalt. c.* 171.

As to the case of *breaking open doors*, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities, but in cases of necessity; and therefore that no one can justify the breaking open another's door to make an arrest; unless he first signify to those in the house,

the cause of his coming, and request them to give him admittance—2 *Haw*, 138.

But where a person authorised to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

(1) Upon a *capias* grounded on an indictment for any crime whatsoever; or upon a *capias* from a superior court of common law or chancery to compel a man to find sureties for the peace or good behaviour.

(2) When one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, (Mr. Hawkins says) that no one can justify the breaking open doors in order to apprehend him.

But lord Hale, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand, he will not surrender himself, as well as if there had been an express and positive charge against him; and so, he saith, hath the common practice obtained, notwithstanding the contrary opinion of lord Coke: for in such case the process is for the king, and therefore a *non omittas* is implied—1. *H. H.* 580, 583, 2. *H. H.* 117.

And as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do upon a civil process: but then he must at his peril see that the felon be there; for if the felon be not

there, he is a trespasser to the stranger, whose house it is—2. H. H. 117.

But it seems that he that arrests as a *private man* barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected; but he doth it at his peril; that is, if in truth he be a felon, then it is justifiable; but if he be innocent, but upon a reasonable cause suspected, it is not justifiable—1. H. H. 82.

But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it; and therefore they cannot break open doors: but in case of a constable, he is punishable if he omit it upon complaint—2. H. H. 92.

(3) Upon a warrant from a justice of the peace, to find sureties for the peace or good behaviour—1. H. H. 582. 2. H. H. 117.

And in general, Mr. Dalton says, an officer upon any warrant from a justice, either for the peace or good behaviour, or in any case where the king is party, may by force break open a man's house, to arrest the offender—*Dalt. c.* 169.

(4) On a warrant to search for stolen goods, the doors may be broken open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion is punishable—2. H. H. 151.

(5) Where forcible entry or detainer is found by inquisition before justices of the peace, or appears on their view—2 Haw. 139.

(6) On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfei-

ture to the commonwealth, and authorises the justice to give such judgment or conviction for it.

(7) where an affray is made in a house, in the view or hearing of the constable, he may break open the doors or take them. 2 *Haw.* 139.

(8) If there be disorderly drinking or noise in a house, at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder—2 H. H. 95.

(9) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house—2 *Haw.* 139.

But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door—1 *H. H.* 554.

In a civil suit the officer cannot justify the breaking open an outward door or window, in order to execute process. If he doth, he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors if he findeth that necessary, in order to execute his process.

For a man's house is his castle for safety and repose for himself and family; but if a stranger, who is not of the family, upon a pursuit taketh refuge in the house of another, this rule doth not extend to *him*, it is not *his* castle, he cannot claim the benefit of sanctuary therein.

And it is always to be remembered, that this rule must be confined to the case of arrest upon process in civil suits only. For where a felony hath been committed, or a dangerous wound given; or even where a minister of justice cometh armed with process, founded on a breach of the peace: the party's own house is no sanctuary for him: in these cases,

the justice which is due to the public, must supercede every pretence of private inconvenience—*Foster*, 320.

Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty.

If there be a warrant against a person for a trespass or breach of the peace, and he flies merely, and so will not yield to the arrest, or being taken, makes his escape, if the officer kills him it is murder.

But if such person, either upon the attempt to arrest, or after the arrest, ASSAULT THE OFFICER, to the intent to make his escape from him, and the officer, standing upon his guard, kills him; this is no felony; for he is not bound to retreat as far as he possibly can, as in common cases of *se defendendo*, for the law is his protection—2 *H. H.* 118.

But where a warrant issueth against a person for felony, and either before arrest or after, he flies and defends himself with stones or weapons; so that the officer must give over his pursuit, or otherwise cannot take him without killing him; if he kill him it is no felony. The law is the same where a constable doth it by virtue of his office, or on hue and cry.

But then there must be these cautions: 1. He must be a lawful officer: or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken.

But though a private person may arrest a felon; and if he fly so that he cannot be taken unless he

be killed, it is excuseable in this case on account of the necessity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter: for an innocent person is not bound to take notice of a private persons suspicion.

A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it.

An officer (though no particular form of words is necessary) giveth sufficient notice what he is, when he saith to the party, I arrest you in the name of the commonwealth; and in such case, the party at his peril ought to obey him, though he doth not know him to be an officer: and if he have no lawful warrant, the party grieved may have his action of false imprisonment.

But if he acts out of his precinct, or is not sworn or commonly known, he must shew his warrant, if demanded; otherwise the party may make resistance, and needs not to obey it.

But if the constable has no warrant, but doth it by virtue of his office, as a constable, it is sufficient to notify that he is constable, or that he arrests in the name of the commonwealth.

If the constable come unto the party, and require him to go before the justice, this is no arrest nor imprisonment.

Bare words will not make an arrest, without laying hold on the person or otherwise confining him. But if an officer comes into a room, and tells the party he arrests him, and locks the door, this is an arrest: for he is in custody of the officer.

It hath been holden, that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large, upon his promise to come again, and find sureties, he cannot afterwards arrest him

by force of the same warrant: however, if the party return, and put himself again under the custody of the constable, it seems that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice, in pursuance of such warrant; but in this the law doth not seem to be clearly settled.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, although he were out of view; or that he shall fly into another town or country.

V. *What is to be done after the arrest.*

1. *By a private person.*

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; by delivering him to a constable to carry him before a justice of the peace.

2. *By a constable without warrant.*

If the constable or his watch, hath arrested affrayers, or persons drinking in a tavern disorderly, at an unseasonable time of night; he may put the persons in the stocks, or in a public prison, if there be one, till the heat of their passion or intemperance is over; though he deliver them afterwards; or till he can bring them before a justice.

3. *By an officer by warrant.*

If the arrest is by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party according to the direction of the warrant. If it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice. But if the warrant be to bring him before any justice of the county, then it is in the election of the officer, to bring him before what justice he thinks fit, and not in the election of the prisoner.

But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice; or if there be danger of a present rescue, or if the party be sick; he may secure him in the stocks, or in an house, till the next day; or such time as it may be reasonable to bring him.

And when he hath brought him to the justice, yet he is in law, still in his custody, till the justice discharge, or bail, or commit him.

4. *Returning the warrant.*

But it is said the constable is not obliged to return the warrent itself, but may keep it for his own justification, in case he should be questioned for what he had done; but only to return what he has done upon it.

PROCEEDINGS IN THE CASE OF OFFENDERS AGAINST THE LAWS OF THE UNITED STATES.

In the act of congress establishing the judicial courts of the United States, it is provided that for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found agreeably to the usual mode of process against offenders in such state, and at the expence of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial, before such court of the United States, as by this act has recognizance of the offence. Copies of the process shall be returned as speedily as may be, into the clerk's office of such court; together with the recognizance, of the witnesses, for their appearance to testify in the case. Which recognizances, the magistrate, before whom the examination shall be, may require, on pain of imprisonment. If such commitment of the offender, or the witnesses, shall be in a district other than that in

which the offence is to be tried, it shall be the duty of the judge of that district, where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender; and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. Upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usages of law. If a person committed by a justice of the supreme, or a judge of a district court, for an offence, not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme, or superior court of law of such state. (Laws of the U. S. v. 1. p. 72.)

It is also provided by a subsequent act, that all judges and justices of the courts of the several states having authority by the laws of the United States to take cognizance of offences against the constitution and laws thereof, shall respectively have the like power and authority to hold to security of the peace and for good behaviour in cases arising under the constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states in cases cognizable before them. (Laws of the U. S. v. 4. p. 231.)

Of the employment of Military Force in making arrests.

As to the power and duties of military officers

in arresting public offenders, it is to be observed that no military officer whether of the *regular troops or of the militia* is possessed of any authority in this respect more than a private citizen, except in a few special instances which will presently be noticed: on the other hand their obligations, must, generally speaking, be the same.

If a robbery be committed, if a murder be perpetrated, if a dangerous wound be given, in the presence of a soldier, whether commissioned or non-commissioned; he is as much bound, under pain of fine and imprisonment to apprehend the offender, as any other individual.

If a treason or felony be done and any one, whether in a civil or military station, has legal grounds to suspect any particular person as the offender; the law countenances him in arresting such suspected person; and whether the suspicion be just or lawful, shall be determined by the court in an action of false imprisonment brought by the party grieved. 2 *Inst.* 52.

Or if he see a man upon the point of committing a treason or felony, or doing any act which would manifestly endanger the life of another; he may lay hold of him, and detain him, so long, till it may reasonably be presumed that he hath changed his purpose.

In all these cases the military man stands precisely on the same ground as any other citizen. He has no higher powers; he has no lower sphere of duty. His authority is not enlarged: his obligations are not diminished. They are both the same as belong to those who have simply a civil character. It is merely as a citizen, indeed, that he interferes in the maintenance of the laws. His conduct likewise, after having made an arrest, must be precisely the same as that which all others are bound to pursue. The accused must be brought

before a civil officer vested with authority to bail him, or commit him to custody till he can receive a legal trial in the county or district in which his offence was committed.

These observations may be made *generally* as to the powers and duties of military persons, whether they belong to the militia or to the standing forces of the country.

As to those particular cases in which they are *called upon* to act in their *military capacity* in aid of the civil power, they depend with us entirely on especial provisions in the laws of Congress or in the statutes of the Mississippi territory. It will be most convenient to examine what those provisions are, first, with regard to the militia, and 2dly, with regard to the regular troops. The general militia law of the United States, is silent upon this subject. It does not appear, indeed, ever to have been in the contemplation of Congress that the militia were to come into the place of the old *posse comitatus*: or that the commanding officers of regiments, or even the governors of states should at all times and upon all occasions which their judgment might dictate, be authorised to embody the militia. Two laws were passed "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." The last, which was passed in the year 1795, and which repeals the former act, provides "that whenever the United States shall *be invaded* or be in imminent *danger of invasion* from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary, to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper. And

in case of an insurrection in any state against the government thereof; it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection. It is also further enacted "that whenever the laws of the United States shall be *opposed or the execution thereof obstructed* in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act" (which are the same as those which are vested in the sheriffs) "it shall be lawful for the President to call forth the militia of such state, or of any other state or states as may be necessary to suppress such combinations, and to cause the laws to be duly executed." (Laws of U. Sty. 3. p. 188.)

In another act, passed the preceding session, the object of which is to prevent expeditions from the United States against nations at peace with them, the President of the United States is authorised to employ such part of the land or naval forces of the United States or of the militia thereof, as shall be judged necessary for the purpose of taking possession of and detaining any ship or vessel fitted out for such an expedition, and also for the purpose of compelling any foreign ship or vessel to depart the United States, which by the law of nations or existing treaties ought not to remain therein. (V. 3. p. 92.)

Another case in which the militia as well as the regular troops of the United States can be called upon to aid the civil power, is particularly provided for in the "act for the more effectual preservation

of peace in the ports and harbours of the United States and in the waters under their jurisdiction.

When a person has committed offences of which the United States have cognizance, and is on board any foreign armed vessel, in any port or harbour of the United States, or in any waters within their jurisdiction, and the marshal upon receiving a warrant to apprehend the offenders, shall deem the ordinary *posse comitatus*, insufficient to insure the execution of the warrant, he may obtain an order from the judge or justice issuing the warrant, directed to any officer of the militia or regular troops, or of armed vessels of the United States in the vicinity, requiring him to aid the marshal with all the force under his command or such part as may be necessary in executing the said warrant. Laws U. S. v. 7. p. 331.

As to the provisions contained in the laws of the Miasissippi Territory for the employment of the militia in the preservation of the public peace and safety, they seem, excepting what concerns patrols, to relate entirely to cases of invasion or insurrection. The "act to organize the militia," sec. 26, enacts, that the governor be authorised and empowered on *any invasion or insurrection* to call forth such a number of the militia and from such counties as he may deem proper; and orders for the militia to be called forth as aforesaid shall be sent to the commanding officer of the brigade, with notification of the place or places of rendezvous, who shall immediately take measures for detaching the same with the necessary numbers and ranks of officers, by detail and rotation of duty." And it is further enacted "that if a *sudden invasion* shall be made into any county in this territory, or in case of *insurrection* in any county, the commanding officer in such county, is hereby authorised and required to order out the whole or such part of the militia as

he may think neceesary, and in such manner as he may judge best for repelling or suppressing such invasion or insurrection, or for assembling the militia required upon such invasions or by order of the executive, the same measure shall be taken to summon them as is directed in the case of musters." (Statutes p. 69.)

The great object, indeed, of the establishment of a militia, is to *provide for the national defence*, and by no means to supercede the ancient common law method of employing civil officers in the execution of civil process, and of furnishing them with force, where force is necessary, by means of the ordinary *posse comitatus*, or citizens of the county assembled by the civil officers themselves on the spur of the occasion.

As to the *regular troops* and their authority in arresting or assisting in the arrest of offenders; some notice has already been taken of them in the extracts which have been made from the laws of congress with relation to the militia.

The act for the preservation of peace in our ports and harbours, after making the provision just now cited for the case of offenders against the laws of the *United States*, taking refuge on board a foreign armed vessel, goes on to authorise the governor of a state, on being satisfied that the ordinary *posse comitatus* is insufficient to ensure the execution of state process, to issue his order to any officer having the command of regular troops or armed vessels of the United States, in the vicinity, requiring him to aid the officer, charged with the execution of the process with all the force under his command or such part thereof as may be necessary in arresting any offender against the *laws of the state*, who may be on board any foreign armed vessel, and in arresting all those giving aid and countenance in re-

sisting the civil authority. (Laws U. S. v. 7. p. 332.

The "act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers," enacts that "it shall be lawful for the military force of the United States to apprehend every person who shall or may be found in the Indian country over and beyond the boundary line between the United States and the said Indian tribes in violation of any of the provisions or regulations of that act, and him immediately to convey in the nearest, convenient and safe route to the civil authority of the United States, in some one of the three next adjoining states or districts to be proceeded against in due course of law."

In like manner, if any person who has violated any of the provisions or regulations of the said act be found in any state or territory; "it shall be the duty of the military force of the United States when called upon by the civil magistrate or any proper officer, or other person duly authorised for that purpose and having a lawful warrant, to aid and assist such magistrate, officer or other person, authorised as aforesaid, in arresting such offender and him committing to safe custody for trial according to law." (Laws U. S. v. 6. p. 49 & 50.

Where offences are committed by military men themselves; the officers of the army are in all cases bound to aid the civil magistrate in bringing them to justice. The 33d. article included in the "act for establishing rules and articles for the government of the armies of the United States," directs that "when any commissioned officer or soldier shall be accused of a capital crime, or of having used violence or committed any offence against the persons or property of any citizen of any of the United States, such as is punishable by the known laws of the land; the commanding officer

and officers of every regiment, troop or company to which the person or persons so accused shall belong, are hereby required upon application duly made by or in behalf of the party or parties injured, to use their utmost endeavours to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons, to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons; the officer or officers so offending shall be cashiered." (Laws of the U. S. v. 8. p. 44.)

ASSAULT AND BATTERY.

ASSAULT is an attempt or offer to beat another without touching him; as if one lift up his cane or his fist in a threatening manner at another; or strike at him, but miss him; or present a gun at him at such distance as the gun will carry; or point a pitchfork at him standing within the reach of it.

Battery is the unlawful beating of another; the least touching of another's person, wilfully, or in anger, is a battery; every man's person being sacred, and no other having a right to meddle with it in even the slightest manner. A battery is in some cases justifiable, as where one who hath authority, as a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self defence: for if one strikes me first, or even assaults me, I may strike in my own

defence. So likewise in defence of my goods or my possession, if a man endeavonrs to deprive me of them, I may lay hands upon him to prevent him: and if he persists with violence, I may proceed to beat him away. Likewise if a person comes into my house, and will not go out, I may lay hold of him, and turn him out.

These are breaches of the peace, an affront to the government, and a damage to the citizens—they are indictable and punishable by fine and imprisonment in the county court, or with other ignominious corporal penalties, where they are committed with any attrocious design, as in case of an assault, with intent to murder, or to commit a rape, or the crime against nature.

WARRANT FOR AN ASSAULT.

Washington. { *The Mississippi Terrritory of the United States.*

To the Constable of

Whereas complaint hath been made before J. P. esquire, one of the justices of the peace, in and for the said county, upon the oath of A. I. of , in the said county, taylor, that A. O. of aforesaid, butcher, did on the day of violently assault and beat him, the said A. I. at , aforesaid, in the county aforesaid: These are therefore to command you forthwith to apprehend the said A. O. and to bring him before the said J. P. to answer unto the said complaint, and to be further dealt withal according to law. Given under the hand and seal of the said J. P. the day of, &c.

ASSIZE.

THE laws of the Mississippi territory having provided,* that the territorial judges "shall have all the power and jurisdiction of justices of assize, *nisi prius*, *oyer et terminer*, and gaol delivery," it will be proper to give a brief sketch of the nature of those several commissions, especially as certain duties on the part of justices of the peace are involved in the authority given to the judges.

ASSIZE anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possession. The judges of England, in their circuits, have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

To which commission of *assize*, four other commissions are now superadded, to wit;

1. A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

2. A commission of *oyer* and *terminer*, directed to the judges, and many other gentlemen of the county: by which they are empowered to *hear* and *determine* treasons, felonies, and other misdemeanors, by whomsoever committed; whether the persons to be tried be in gaol or not in gaol.

3. A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and

* Statutes, page 108.

on return of the verdict of the jury to the court above, the judges there give judgment.

4. A commission of the *peace* in every county of their circuit.

By the precept for the general gaol delivery above mentioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons, with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

By virtue whereof, all justices of the peace, mayors, and others above mentioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect.

Also, by ancient custom, that is by the common law of the land, before the coming of the judges, the high constables issue their warrants to the petty constables to make presentments of all crimes and offences cognizable at the assizes: to the intent, as it seemeth, that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances above mentioned.

BAIL.

I. *What it is.*

BAIL, from the French *bailler*, to deliver, signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law.

II. *Difference between bail and mainprise.*

The difference between bail and mainprize is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him and bring him before a justice: and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties.

The ordinance for the government of the territory provides, that all persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumption great.

Capital offences, is a term which has frequently been used by legislatures and by legal writers as synonimous with *felonies*, as all felonies, with the exception of petit larceny were capital at the common law. To many felonies however, very different punishments have been since assigned by the territorial statutes: and the only offences now capital, are murder, rape, man-stealing, arson, robbery, burglary, slave-stealing, counterfeiting and forgery.

Any person accused of any of these offences, if the proof be evident, or the presumption great against him, cannot be bailed. In all other cases, the party may be bailed, by any justice of the peace before commitment; or by any of the territorial judges afterwards, on proper application.

If a justice take insufficient surety, and the par-

ty appear not, he is finable by the superior court. But if the prisoner appear thereupon, the justice is safe.

If a person who has power to take bail, be so far imposed upon, as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal: for that insufficient sureties are no sureties.

The person who is to take the bail, may examine them on their oaths concerning their sufficiency.

To refuse bail where the party ought to be bailed, the party offering the same, is a misdemeanor, punishable, not only by the suit of the party, but also by indictment.

Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law.

FORM OF BAIL.

Washington. BE it remembered, that on the day of ; in the year of our lord , A. O. of ; yeoman, A. B. of , yeoman, and B. B. of , yeoman, came before us J. C. and W. B. justices of the peace in and for the said county; and severally acknowledged themselves to owe to the governor of the Mississippi Territory; that is to say, the said A. O. two hundred dollars, and the said A. B. and B. B. one hundred dollars each; to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition underwritten.

J. C.
W. B.

The condition of this recognizance is such, that

if the above bound A. O. shall personally appear before the judge * of the Mississippi Territory, at the next superior court, of criminal jurisdiction,† to be holden in and for the said county; then and there to answer to the Mississippi Territory, for and concerning the felonious taking and stealing of , the property of A. M. of , yeoman; with the suspicion whereof the said A. O. stands charged before us, the said justices; and to do and receive what shall by the court be then and there enjoined him; and shall not depart the court without license; then the above written recognizance shall be void.

(N. B. Here the parties may sign their names, but it is not necessary.)

Or if the party is in prison, the following form may be adopted.

Washington. BE it remembered, that on the day of , in the year of our lord , before me , one of the judges of the Mississippi territory, at Fort Stoddert, in the said county, did come A. B. and B. B. of in the said county, yeomen, and took in bail until the next superior court of criminal jurisdiction, to be holden in the said county, one A. O. of , labourer, taken and detained in prison, for suspicion of a certain felony in stealing , the property of , and took upon themselves each of the said A. B. and B. B. under the penalty of two hundred dollars, of good and lawful money of the United States, of the goods and chattels, lands and tenements, of them, and each of them, to the use of the Mississippi ter-

*Judges will be more proper in the western part of the territory.

† This phraseology is proposed for designating the court, as it will apply both to the regular circuit and superior courts, and to a special court of *oyer* and *terminer*, should any such be previously holden for the trial of the offender.

ritory, to be levied; if the said A. O. shall not personally appear, at the said next superior court, before the judge of the said territory assigned to hold the same, to stand to right concerning the felony aforesaid, according to law.

Given under, &c.*

Hereupon a warrant issues for his deliverance, thus:

Washington. J. T. *esquire, one of the judges of the Mississippi territory, to the keeper of the gaol at , in the said county, greeting:*

FORASMUCH as A. O. of , labourer, hath before me, found sufficient sureties, to appear at the next superior court of criminal jurisdiction, to be holden in the said county, to answer to such things as shall be then on the behalf of the Territory, objected against him; and namely, to the felonious taking of ; for the suspicion whereof he was taken and cnmmitted to your said gaol; I command you that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer; but that you deliver him thence and suffer him to go at large, and that upon the pain that will thereon ensue. Given under my hand and seal, in the said county, the day of , in the year of our lord .

In the case of bailment for felony by the common law, those that bail him are severally bound to the government by recognizance in a certain sum that the prisoner shall appear at a certain day, &c.

By the statutes of 1 and 2 Phil. and Mar. and 2 and 3 Phil. and Mar. the bail is for the felon in double and for each of the bail in single; as for example if the felon be 40 £. the bail is 20 £. a piece: and this seems to have become the more prevailing mode. Sec. 4th, Inst. 178.

BARRATRY.

BARRATRY is the offence of frequently exciting and stirring up suits and quarrels between the citizens of the state, either at law or otherwise. The punishment for this offence in a common person, is by fine and imprisonment; but if the offender belongs to the profession of the law, as is sometimes the case, a barrator, who is thus able as well as willing to do mischief ought also to be disabled from practising for the future. Hereunto may be referred the offence of suing another in the name of a fictitious plaintiff; either one not in being at all or one who is ignorant of the suit. This offence, if committed in the superior court, may be punished as a contempt, at their discretion; or it may be punished by indictment. Some further provisions made by the laws of the Mississippi Territory with regard to mal-practices by attornies in the exercise of their profession, will be found in the statutes, page 227.

BLASPHEMY AND PROPHANENESS.

ALL blasphemies against GOD, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all prophane scoffing at the Holy Scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denounciations of judgments; and all open lewdness, grossly scandalous, are punishable by fine and imprisonment; and also such corporal punishment as to the court shall seem meet, according to the heniousness of the crime.

By the act for the suppression of vice and immorality, it is decreed, that "if any person shall prophanely curse or swear, in the hearing of any justice; or shall be convicted of profanely cursing or swearing, by the oath of one or more witness, or witnesses, on confession of the party before any justice; he shall pay for every such offence, fifty cents." But the prosecution must be within ten days after the commission of such offence.

BURGLARY.

BURGLARY is a felony at common law, in breaking and entering the mansion house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. Thus; if the thief breaketh the glass of the window, and with a hook or other engine, draweth out some of the goods of the owner; this is burglary; for there was an actual breaking of the house.

Lord Hale says, these acts amount to an actual breaking; opening the casement, or breaking the glass window; picking open the lock of a door, or putting back the lock or the leaf of a window, or unlatching the door that is only latched.

It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a hook, to draw out goods, or a gun into a window, which he hath broken, or into a hole of the house, which he hath made with intent to murder or kill: this is an entry and breaking of the house: but if he doth barely break the house, without any such entry at all, this is no burglary.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance; this is burglary in all. It must be by night, and not by day; if there be day-light enough begun or left, by which to discover a man's face, it is no burglary. But this does not extend to moon-light: for then many midnight burglaries would go unpunished.

It must be in a mansion house, or a church, or the gates or walls of a town: that of the mansion house is the most frequent; and in that case it is indispensibly necessary to form its guilt, that it must be a mansion or dwelling house; no distant barn, ware-house, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses, wherein no man resides; and which therefore, for the time being, are not mansion houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath left only for a short season, with an intention of returning, is an object of burglary. If the barn, stable, or ware-house be parcel of the mansion house, though not under the same roof, or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall: that is, if used together with the capital house in the same yard, whether open or enclosed.

Such breaking and entering must be with a felonious attempt, otherwise it is only a trespass: and it is the same thing whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge: and therefore such a breach and entry as hath been before described, by night, with intent to commit a robbery, a murder, a rape, or any o-

ther felony, is burglary; whether the thing be actually perpetrated, or not; and it makes no difference whether the offence were felony at common law, or only created so by statute or act of assembly: for a statute or act which makes an offence felony, gives it, incidentally all the properties of a felony at common law.

WARRANT TO APPREHEND A BURGLAR.

Washington. { *The Mississippi Terrritory of the United States,*

To the Sheriff of Washington County, Greeting:

FORASMUCH as A. I. of , in the county of , yeoman, hath this day made information and complaint, upon oath before J. P. esquire, one of our justices of the peace for the said county, that yesterday in the night, the dwelling house of him, the said A. I. at , aforesaid, in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard, of the value of ten dollars, of the goods and chattels of him, the said A. I. feloniously and burglariously stolen, taken, and carried away from thence: and that he hath just cause to suspect, and doth suspect, that A. O. late of , in the county of , labourer, the said felony and burglary did commit. These are therefore to command you, that immediately upon sight hereof, you do apprehend the said A. O. and bring him before the said J. P. to answer the premises, and to be further dealt with according to law. Herein fail you not. Given under the hand and seal of the said J. P. the day of , in the year of our Lord

BURNING OF HOUSES.

ARSON is the malicious or wilful burning of the house, or out-houses of another man.

First, not only the bare dwelling-house, but all out-houses, that are parcel thereof, though not contiguous thereto, nor under the same roof: as barns and stables, may be the subject of arson; also by the common law, a single barn in the field, if filled with hay or corn, or the burning of a stack of corn. This offence may be committed, by wilfully setting fire to one's own house, provided one's neighbours' house is thereby also burnt: but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. Such wilful firing of one's own house in a town, is a high misdemeanor, punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour; and if a landlord or reversioner sets fire to his own house, of which another is in possession, under a lease from himself, or from those whose estate he hath, it is arson; for during the lease, the house is the property of the tenant.

Secondly, the burning or consuming of any part is sufficient, though the fire be afterwards extinguished. It must also be a malicious burning; otherwise it is only a trespass; and therefore no negligence or mischance amounts to it.

This offence is a capital felony, with regard both to the principal, and the accessary before the fact.

CERTIORARI.

CERTIORARI is a writ, issuing from the superior court, directed to the judges or officers of inferior courts, commanding them to certify; or to return the records of a cause, depending before them to the superior court. This is frequently done, to consider and determine the validity of indictments, and the proceedings thereon; and to quash and confirm them, as there is cause; or where it is surmised that a partial or insufficient trial will probably be had in the court below, in order to have the defendant tried in the superior court.

As a matter of right, the court will grant it for the commonwealth: but may either grant or deny it, at their discretion, to the defendant.

It will not be granted after conviction, but for some special cause; as where the justices are doubtful what judgment to give: nor will it generally be granted at the instance of the defendant, to remove an indictment for any great misdemeanor, where that would tend to discourage the prosecution; nor after issue joined, or confession of the fact in the court below.

It lies in all cases where a writ of error will not lie, and to all inferior jurisdictions to have their proceedings returnable into the superor court: and consequently to justices of the peace: even in such cases, which they are empowered by statute finally to hear and determine; for the superintendancy of that court is not taken away except by express words.

Such, however, is the reasoning on which the claim of the court of king's benceinh England, is maintained: and it is applied by Judge Haywood to the superior court of North-Carolina. It should seem that it is equally applicable to the superior courts of this territory, since they are empowered

to "hear and determine all and all manner of pleas, plaints and causes, which shall be removed and brought there from any court to be holden for the respective counties, and examine and correct all and all manner of errors of the justices of the inferior courts—and examine, correct and punish, the contempts, omissions and neglects, favours, corruptions and defaults of all or any of the justices of the peace, &c."—(*Statutes*, p. 104.)

A writ of certiorari, when issued and delivered to an inferior court, for removing any record or other proceedings, as well upon indictment as otherwise, supercedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the superior court remands the record to the court below, to be there tried and determined.

CHAMPERTY.

CHAMPERTY is a bargain with plaintiff or defendant, to divide the thing sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence.

This offence is punishable at the common law, by fine and imprisonment.

It seemeth to be an high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do; and on that consideration, sells his pretensions at an under rate: and it seemeth not to be material, whether the title so sold be a good or bad one; or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all

means to be discountenanced, as manifestly tending to oppression, by giving opportunities to rich men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons; which perhaps they might safely enough maintain against their proper adversary.

CHEATING.

CHEATS, which are punishable by the common law, by fine and imprisonment, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his own right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage; which in truth contained no such thing; but only a warrant of attorney to confess a judgment; or by suppressing a will, and such like.

On an indictment against the defendant; a miller for changing corn delivered to him to be ground, and giving bad corn instead of it; it was moved to quash the same, because it is only a private cheat, and not of a public nature. It was answered, that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the court unanimously agreed not to quash it.

If a minor goes about the country, and pretending to be of age, defrauds many persons, by tak-

ing credit for considerable quantities of goods, and then insists on his nonage; the persons injured cannot recover the value of their goods, unless they were necessaries; but they may indict and punish him for a common cheat.

COMMITMENT.

WITHOUT WARRANT.

ANCIENTLY there were more felons committed to gaol without a mittimus in writing, than there were with it. Such were all the commitments, by constables, watchmen, and private persons arresting for felony, and bringing to the common gaol, long before there were any justices of the peace: and yet mittimusses are not of so ancient date even as they.

But now, since the *habeas corpus* act, a commitment in writing seems more necessary than it was in former times; otherwise the prisoner may be admitted to bail upon that act, whatsoever his offence may have been.

WHO MAY BE COMMITTED.

I. *Persons not bailable, or not finding bail.*

There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed.

II. *Persons guilty of contempt.*

It is said, that wheresoever a justice is empowered by any statute, to bind a person over, or to cause him to do a certain thing; and such person being in his presence, shall refuse to be bound, or

to do such thing, the justice may commit him to the jail, to remain there till he shall comply.

III. *Persons charged with felony.*

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him.

IV. *Persons charged on suspicion.*

But if he be charged with suspicion only of felony, and it does not appear that any felony at all has been committed, or if the fact charged as a felony, be in truth no felony in point of law; or if, upon enquiry, it manifestly appear, that the suspicion entertained of the prisoner is wholly groundless, the justice may discharge him.

AS TO THE FORM OF A COMMITMENT.

I. *In whose name.*

It must be in writing; either in the name of the Mississippi territory of the United States and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority; and must be directed to the sheriff or the keeper of the prison.

II. *The party's name.*

It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like; and to add that he refuseth to tell his name.

III. *The oath.*

It is safe, but not necessary to set forth, that the party is charged upon oath.

IV. *The cause.*

It ought to contain the cause, as for treason, or felony, or suspicion thereof: otherwise, if it contain no cause at all, if the prisoner escape, it is no offence at all: whereas, if the mittimus contained the cause, the escape were felony at least, though he were not guilty of the offence: and therefore for the benefit of the public justice, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. Hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law.

Also, it ought to contain the certainty of the cause: and therefore if it be for felony, it ought not to be generally for felony: but it must contain the special nature of the felony, briefly; as for felony *for the death of such an one*; or for burglary, *in breaking the house of such an one*: and the reason is, because it may appear to the judges, upon a *habeas corpus*, whether it be felony or not.

But the want hereof seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment, to excuse the gaoler or officer, that the matter was for felony.

V. *Conclusion.*

It must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. But if the conclusion be irregular, it doth not seem to make the warrant void; but the law will reject that which is surplusage, and the rest shall stand: so that if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged; but the wrong conclusion shall be

rejected. It must be signed by the justice but his seal is not now necessary.*

FORM OF A WARRANT OF COMMITMENT.

Washington. { *The Mississippi territory of the United States to the keeper of our gaol, at Wakefield, in our said county of Washington, or to his deputy: Greeting:*

WHEREAS A. O. late of , in our said county, yeoman, is arrested for suspicion of felony; by him, as it is said, committed, in feloniously taking and carrying away , of the value of , the property of : We therefore command you, and each of you, that you receive him, the said A. O. into your custody, in our said gaol; or that one of you do receive him, there to remain till he be delivered from your custody, according to law.

Witness J. P. esquire, one of the justices assigned to keep the peace in our said county; the day of ; in the year of our Lord .

FORM OF A WARRANT OF COMMITMENT IN GENERAL.

Washington. { *The Mississippi territory of the United States, to the constable of ; in the said county; and to the keeper of our goal, at Wakefield, in our said county of Washington, or to his deputy: Greeting:*

THESE are to command you, the said constable; forthwith to convey and deliver into the custody of the said keeper of the said gaol, the body of A. O. charged before J. P. esquire, one of our justices of the peace, in the said county, with;

* See Statutes, p. 86.

[*here specify the offence.*] And you the said keeper, are hereby required to receive the said A. O. into your custody, in the said gaol, and him there safely to keep, &c. Given under the hand and seal of the said J. P. the day of ; in the year of our lord

CONSPIRACY.

A CONSPIRACY is an agreement between two or more persons, to indict an innocent man of felony, falsely and maliciously. It is punishable at the common law, by fine, imprisonment, the pillory, and finding sureties for the good behaviour, for such time as the court may order, or by one or more of them only; at the discretion of the court.

Nor can there be any doubt, that by the common law, all confederacies whatsoever, wrongfully to injure another, whether it be by indirect means, to reduce him to poverty, or falsely and maliciously to blast his character, are highly criminal, and justly expose the offenders to a prosecution for a conspiracy.

CONSTABLE.

THE office of Constable is very ancient and respectable, and existed by the common law.

There are in England two kinds of constables: one kind are constables of hundreds; that is of districts, originally comprehending a hundred families; and these are commonly called high constables: the other kind are constables of tithings, or districts, which originally comprehended ten families; and these are called petit constables, or

tithing men. It is not clearly settled to whom the power of appointing constables originally belonged, at common law; and whether it depended on the will of the sheriff, and the lord of the courtleet; or were determined by popular suffrages. It is certain, however, that when a person lawfully appointed a constable, refuses to take the oath of office, he may be indicted for such refusal, and any justice of the peace may bind him over to the next court, competent to try the offence. The constable being a principal peace officer, and it being necessary for the preservation of the peace, that a competent number should be appointed in every county; the justices of the peace have, since the institution of their office, assumed the power of conservators of the peace; not only to swear constables who have been chosen at the court of the sheriff, or lord of the leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriff or lords, to hold their courts; or to take care that such officers are appointed in them. And this power in the justices has been sanctioned in the superior courts of England, and established by their decisions. And so likewise has the power, which they have sometimes exercised, of displacing constables, for good causes of removal.

The ordinance for the government of this territory provides, "that all magistrates, and other civil officers, not therein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor." It should seem, however, that for the same reason, that the power of appointing constables has been conceded to justices of the peace, where the sheriff or lord has neglected to exercise it, and had been ordinarily employed by them, under the principles of the common law, previously to the establishment of

this government; the county courts of the territory may safely appoint officers so essential to the execution of their duties, in cases of necessity at least, and where none are appointed by the territorial governor.

As to the nature of the office of constable, there seems to be no doubt but that the original institution of it was for the better preservation of the peace: for which purpose a constable is said to be authorised by the common law, to arrest felons, and also all suspicious persons that go abroad in the night, and sleep by day; or resort to bawdy-houses, or keep suspicious company; and to suppress affrays.

Also it is said, that a constable was at the common law, a subordinate officer to the conservators of the peace; and consequently since the office of such conservators hath been disused, and justices of peace constituted in their stead, it hath been always holden, that a constable is the proper officer to a justice of peace, and bound to execute his warrants: and therefore it hath been resolved, that where a statute authorises a justice of peace to convict a man of a crime, and to levy the penalty by warrant or distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it.

Yet in as much as the office of a constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when, by reason of sickness, absence, or other special cause, he cannot do it himself.

The constable is by the common law, a conservator of the peace. He may in the name of the state, command affrayers to depart, and to keep the peace. He may without a warrant, commit to the

stocks, &c. any that make any affray, or assault others; or threaten to beat or kill another; or are about to break the peace in his presence, till he can get assistance to carry the offender before a justice of the peace, to be committed to prison if he will not find sureties. But the constable is punishable for the escape of the prisoner. If the affray is over, he must have a warrant to carry the offender before a justice of the peace; if the affray is in a house, the constable may break into the house to see the peace kept; if such offenders fly into another country, he may make fresh pursuit, and take them there. If an assault is made upon him, he may defend himself, and justify the beating of another. If he happen to be killed in doing his duty, it is murder. He may command all persons to assist him to prevent a breach of the peace; and if any one refuses, he may be bound over to the next court of competent jurisdiction, and fined. He must execute warrants directed to him, with speed and secrecy; and not dispute the authority, if the justice of peace has jurisdiction. But if the warrant be to bring one before the justice, to answer all such matters as shall be objected against him, and doth not contain the special matter, the warrant is unlawful, and he ought not to execute it. Or if the warrant be to take up one for slander, or other cause, not within the jurisdiction, the constable is punishable if he execute it.

If the constable is assaulted in the execution of his office, he need not give way and retreat as far as he can with safety, as private persons ought to do: and if in the striving together, the constable kills the assailant, it is no felony; but if the constable is killed, it shall be construed premeditated murder.

It may be premised generally, that where persons having authority to arrest or imprison, or otherwise

to advance or execute the public justice of the commonwealth, and using the proper means for that purpose, are resisted in so doing, and the party resisting, is killed in the struggle; such homicide is justifiable. And on the other hand, if the party having such authority, and executing it properly, happen to be killed; it will be murder *in all who take a part in such resistance*; this being considered by the law as one of the strongest indications of malice; an outrage of the highest enormity, committed in defiance of public justice against those who are under its special protection.

He need not shew his warrant, being a sworn officer.* If he lets one go, upon his promise to return, and he fail of his promise at the appointed time, the constable cannot retake him by virtue of the same warrant, because he was released by his consent. He is not bound to go up and down with an offender to get sureties; but he may keep him till sureties come to him; and then he is at liberty to go to any justice of the peace, provided it is not too far off, and the constable consents to it. The constable may carry the offender before what justice he pleases, if the warrant is not special: that is to say, to bring the party before the justice who signed the warrant. If a constable has a warrant to execute, and afterwards a *supersedas*; that is a comand to stay or stop, comes from another justice, to whom the party, hearing of the warrant, offered sureties before an arrest; the constable must not then execute it; if he does it is false imprisonment. He may justify the detaining an offender a

* There is a ſtatute in England, 24 Geo. 2, Ch. 44, which provides that no action ſhall be brought againſt any conſtable for any thing done in obedience to the warrant of a juſtice of the peace until a demand has been made of the peruſal and copy of ſuch warrant; and the ſame hath been refuſed or neglected for ſix days after ſuch demand. But it is not in force here.

day, by verbal order of a justice without a warrant: the justice then not having opportunity to examine him.

Farther particulars relating to the powers and duties of a constable, will be found under the words *arrest* and *warrant*.

Oath of a Constable.

You shall swear, that you will well and truly serve the Mississippi territory, in the office of a constable: you shall see and cause the public peace to be well and duly preserved and kept, according to your power: you shall arrest all such persons as in your sight, shall ride or go armed offensively, or shall commit or make any riot, affray, or other breach of the public peace: you shall do your best endeavour, upon complaint to you made, to apprehend all felons and rioters, or persons riotously assembled: and if any such offenders shall make resistance, with force, you shall make hue snd cry, and shall pursue them according to law: you shall faithfully and without delay, execute and return all lawful precepts to you directed; you shall well and truly, according to your knowledge, power, and ability, do and execute all other things belonging to the office of a constable, so long as you shall continue in this office. *So help you God.*

CONVICTION.

A CONVICTION, in the sense in which it is here used, is "a record," under the hand and seal of the magistrate before whom it is taken; "of "the summary proceedings upon any penal statute, "before one or more justices of the peace; or o- "ther persons duly authorised, in a case where the "offender has been convicted and sentenced."

As the above mode of judicature has been introduced in derogation of the common law, (the privileges of which are confirmed by the ordinance for a territorial government,)* and operates to the exclusion of trial by jury, the superior courts of justice have rigidly confined its authority to the strict letter of the respective statutes by which it was established; and in revising its proceedings, they require, that rules, similar to those adopted by the common law, in criminal prosecutions, and founded in natural justice, should appear to have been observed; unless where the statutes expressly dispense with the form of stating them.

But though the courts are *strict* in forming their judgments upon convictions, they will not always be *astute* in finding objections to them.

Accordingly, in *R. v. Chandler*, J. Holt says; "in these convictions by justices of peace in "a summary way, where the ancient course of pro- "ceeding, by indictment and trial by jury, is dis- "pensed with, the court may more easily dispense "with forms, and it is sufficient for the justices, in "the description of the offence, to pursue the words "of the statute; and they are not confined to the "legal forms requisite in indictments for offences "by the common law: for though all acts which "subject men to new and other trials than those "by which they ought to be tried by the common

* The second article of the fundamental principles of civil and religious liberty provides that the inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.

"law, being contrary to the rights and liberties of "Englishmen, as they were settled by Magna Char-"ta, ought to be taken strictly: yet when such a "statute is made, one ought to pursue the intent "of the makers, and expound it in so reasonable a "manner as that it may be executed."

A conviction usually consists of six principal parts; first, *the information*; secondly, *the summons*; thirdly, *the appearance* or *non-appearance of the defendant*; fourthly, in case he does not appear, his *defence* or *confession*; fifthly, unless he has confessed, *the evidence*; sixthly, *the judgment*.

I. *Of the information.*

The information must always be stated at large. The information should contain, first, *the day when it was taken*; that it may appear to have been given within the time limited by the statute.

Secondly, *the place where it was taken*; that it may appear the justice was acting within the limits of his jurisdiction.

Thirdly, *the name of the informer*; that as most of the statutes give a part of the penalty to him, it may appear afterwards, that the witness is not the same person; it having been settled, that the informer cannot be a witness where he is entitled to any part of the penalty.

Fourthly, *the name and style of the justice, or justices to whom it is given*; that it may appear he or they have authority to take such an information.

Fifthly, *the name of the offender*.

Sixthly, *the time of committing the offence* ought to be stated, for the same reason that renders the time of taking the information material.

The cases, however, are express, that the particular day need not be mentioned in the *information*, nor, as will be afterwards seen in the *evidence*, provided it mentions the days between which the fact is charged to have been committed.

Seventhly, *the place where the offence was committed*, must be inserted, that it may appear to be within the jurisdiction of the magistrate, before whom the information is laid.

Eighthly, the information must contain "*an exact description of the offence*;" which, in order to give the justice a jurisdiction, must appear to be within both the letter and spirit of the statute that creates it; and which must be exactly described for another reason, namely, that the defendant may know what charge he is to answer.

II. *Of the summons.*

THE *summons* immediately follows the *information*: and since it cannot, from the reason of the thing, be prior in order of time; so if the summons bear date on an earlier day than the information, it would vitiate the conviction.

It seems clear that the party ought, in point of fact, to be summoned, and at a reasonable time and place; and that his having been summoned, ought to appear upon the conviction. In the case of *Rex v. Venables*, which was the case of an order, where the court is less strict than in convictions, "the "court were unanimously of opinion, that the par- "ty in these cases, ought to be summoned in fact; "and if the justices proceeded against a person "without summoning him, it would be a misde- "meanor in them, for which an information would "lie against them."

III. *Of the appearance, or non-appearance of defendant.*

IT must be stated, whether the defendant appeared, or not: for only in the case of his not appearing, is the summons material; and his appearance cures every defect of summons.

In the case of *Reg. v. Barret*, which was a con-

viction for deer-stealing; the third objection was, that there is no due summons. But it was not admitted, the defendant having appeared.

It was formerly made a question, whether the justice, having summoned the defendant, might, if he did not appear, proceed to hear the evidence, and convict him, in cases where the statute does not expressly give such a power; but since the case of *R. v. Simpson*, it seems perfectly settled that he may.

In that case which was a conviction for deer-stealing, it was objected, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment, as it may do here, for want of a distress. Parker, Ch. J. delivered the resolution of the court: "we are all of opinion "the offender may be convicted without appearing. "The statute is silent as to the method of proceed-"ing; and the law of England, it is true, in point "of natural justice, always requires the party "charged with any offence, to be heard before he "be condemned in judgment: but that rule must "have this exception, unless it is by his own de-"fault; were it otherwise, every criminal might "avoid conviction. The law being so, the magis-"trate is bound to give some opportunity to the "party to appear; and if, upon such a notice, he "neither comes nor sends a sufficient excuse, the "magistrate may proceed to judgment. If this "was not to be allowed, the consequence would "be, that the offender would escape unpunished, "because he would never appear purposely to be "convicted; and that would be to make the exe-"cution of the law depend on the will of the offen-"der." He goes on more at large to prove that, "proceedings against a man in his absence are not "against the common law;" but the point being

so thoroughly settled, it is needless to go further with the argument.

IV. *Of the defence of confession.*

IF the defendant appear, he should be asked what he has to say in his defence; and that defence, if he makes any, or his confession, if he confesses, must be stated in the conviction.

This process seems the most regular; because, if he confesses, which though not probable, is possible, it is needless to hear, and consequently to state, the evidence against him; though the evidence may, and in some precedents is, stated first.

It has accordingly been determined, that the defendant's confession, or "pleading guilty," cures the objection, that the evidence was not given in his presence, which otherwise has, in many cases, been held fatal.

On the same principle, if the defendant confesses the charge, the justice may convict without going into any evidence against him: and it has been determined he may do so, even where the statute says nothing of confession, but only directs him to convict, by the oath of a witness or witnesses.

But the confession must be of such facts as fully constitute an offence; otherwise it will not supply any defect of evidence.

The case of *R. v. Little* was upon a conviction on the Hawkers and Pedlars' Acts. The information stated, that the defendant, "*on such a day, at "such a place, was found offering to sale, silk "handkerchiefs, and trading as a hawker, pedlar, "or petty chapman: and that the said T. L.* the "defendant, *did then and there offer to sell a par-"cel of silk handkerchiefs.*" It then stated that the defendant did not, though required so to do, produce any license, as the law in that case provided, directs, to qualify him for his *said trading*:

that defendant being brought before the justice, and being present, and having heard the information read, &c. is asked, &c. "if he hath any thing to "say, or can say any thing, why he, the said T. "L. should not be convicted *of the said offence so* "*charged upon him in form aforesaid*," according to the form, &c. "Whereupon he the said T. L. "doth now here freely and voluntarily *confess*, be-"fore me, the said justice, that he the said T. L. "*did offer to sell silk handkerchiefs to the said T.* "*P. in such manner as is mentioned in the said in-*"*formation.*" It then stated, that he was required by the justice to produce a license, &c. *to travel or trade*, pursuant to the statute; that he did not produce any such license, or any license, &c. and did not pretend or allege that he was the real worker or master of the goods; or the child, apprentice, agent, or servant of any such worker, &c. nor allege any other matter in his defence. The adjudication was, that the said T. L. *is a hawker*, within the true intent, &c. that it manifestly appeared to the justice, that the said T. *L. is guilty of the offence in the said information above laid to his charge, in manner and form*, &c. Therefore that it is adjudged by him the said justice, that the said T. L. be, and he is convicted *of the said premises, in the said information specified*, above laid to his charge, according to the form of the statute, &c.: and the said T. L. forfeit the sum of 12l. for *his said offence*; to be levied and paid according to the form, &c.

Lord Mansfield—"The act of 3 and 4 An. re-"fers to the descriptions in those of W. III. A "single act of selling a parcel of silk handkerchiefs "to a particular person, is not a proof that he was "such a hawker, pedlar, or petty chapman, as "ought to take out a license by these acts of parlia-"ment. Now it is certainly of the essence of the

"crime of not producing a license, that he must "be such a person as ought to take out a license. "And the confession is only of the fact, that he "sold the handkerchiefs to T. P. not that he trad-"ed as a hawker, &c."

He then lays down the strict principle in deciding upon convictions, and adds, "I do not say that "it is necessary to define exactly what a hawker, "pedlar, or petty chapman, *is*; but it is necessary "to allege and shew that he sold the goods, or "traded *as one*."

The other judges concurred.

Mr. Justice Wilmot—"I am clearly of the same "opinion. For certainly a man may sell goods as "a hawker, pedlar, or petty chapman, without be-"ing such a person as is obliged to take out a li-"cense. If he is not obliged to take out a license, "most undoubtedly he ought not to be convicted "in a penalty for not producing one. Now here, "it appears to me, that the justice hath convicted "the man of an offence, of which he hath not proved him to be guilty." By the court, unanimously the conviction was quashed.

V. *The evidence.*

IT should contain, as well as the information, the day and place where it was taken, the name of the offender, and the time when the offence was committed, subject to the qualification above stated; viz; that it may be sufficient to fix it between such and such a day.

It must also contain, first, the name of the witness, that he may appear to be a different person from the informer; at least where the statute generally gives the latter a part of the penalty.

Secondly, the evidence must be stated to have been given in the presence of the defendant, that it may appear he has had the benefit of a cross examination.

At least it must be sufficiently apparent, from the general tenor of the conviction, to satisfy the superior court, that the defendant was actually present at the time of the examination. Nor is it sufficient that the witness, having been sworn in the absence of the defendant, afterwards, in his presence, acknowledges the truth of what he swore before. It must be re-sworn.

A third rule with regard to the evidence is, that *it must be of a fact prior to, or existing at the time of the information*, and not of a fact subsequent to it.

A fourth rule in setting out the evidence is, that *the fact must be proved to have been committed in the place where it was laid*; or at least in some place within the jurisdiction of the magistrate convicting.

The fifth and last rule respecting the evidence is, that *it shall be set out at large*; and, as a necessary consequence, *contain a full and accurate statement of the facts that constitute the offence.*

The above rule branches out into several points:

First, it is perefctly settled, that it is not sufficient merely to state, that the witness swore *to the truth of the premises*; referring to the information; or that the offence, as set forth, was duly proved by the oath, &c. This a variety of cases have determined.

In the case of the King v. Bissex, the court declared, that the case of the King and Queen v. Pullen and others, of oath made *de veritate premissorum*, generally, without setting it forth especially, being sufficient in convictions, is not law now; it having been since that case quite settled, "that "upon a conviction it is necessary that the evi- "dence should be set out, that the court may "judge whether the justices have done right;" but upon an order it is not necessary, because the court will presume they have done right.

It being therefore clear, that general words of reference are not sufficient, it may be laid down, secondly, that the evidence must, in most cases, be at least as full as the information.

But, thirdly, *in some cases, and in some particular expressions*, the evidence is not required to be as full as the information, nor, perhaps, to tally precisely with it.

Thus, if a statute varies the punishment, of an offence, according to the rank, age, or other circumstances of the offender; and the information state his rank, age, or the other circumstances pointed out, the evidence, provided it refers to the person mentioned in the information, need not shew his rank, age, &c.

A fourth observation is, that *in setting forth the act or acts of the defendant that constitute the offence, the evidence should, in general, be more particular than the information.*

Reason seems to require this, where the case will admit of it. In some instances the offence can only be described generally, in the information, and yet consists either of a number of distinct acts, which, in the aggregate, constitute the offence, and must therefore be set forth in the evidence; or of some act, that from its nature, must have been in point of fact, particularly set forth by the witness, and therefore ought to be so by the justice.

VI. *Of the judgment, or adjudication.*

THE *judgment* is a necessary part of every conviction; it should be expressed in the present tense, and it should contain, first, *an adjudication, that the defendant is convicted;* and secondly, *an adjudication of the forfeiture or penalty.*

As to the first, the general way of expressing it is to say, "*that the defendant is convicted of the said "offence against the form of the statute.*"

The second and last branch of the judgment is, *a declaration of the forfeiture or penalty incurred*, and *a distribution of the sum forfeited*, in case the statute so directs.

The distribution of the forfeiture, however, need not be stated by the justice, where the statute expressly gives it in certain proportions.

But where justices are required by a penal statute, to distribute the penalty on conviction amongst certain persons, *according to their discretion*, an adjudication that the forfeiture be disposed of "*as the law directs*," is bad: for in such cases the justice or justices should adjudge what the several proportions shall be.

General form of conviction.

I.

Washington } BE it remembered, that on the
County. } day of , in the year of our Lord ; at , in the county of aforesaid, A. I. of ; cometh before me, J. P. esquire, one of the justices assigned to keep the peace, in the said county, and giveth me the said justice to understand and be informed, that one A. O. of , in the said county, yeoman, on the day of now last past, at in the said county, did [*here set forth the fact, in the words of the statute, as near as may be*] against the form of the statute, in such case made and provided: and afterwards, upon the day of , in the year aforesaid, at aforesaid, in the county aforesaid, he the said A. O. after being duly summoned in this behalf before me the justice aforesaid, appeareth and is present, in order to make his defence against the said charge contained in the said information; and having heard the same, he the said A. O. is asked by me the said justice, if he can say any thing for himself, why

ne, the said A. O. should not be convicted of the premises above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence. Nevertheless, on the day of , aforesaid, in the year aforesaid at aforesaid, in the county aforesaid, one credible witness, to wit: A. W. of yeoman, cometh before me, the justice aforesaid; and before me, the same justice, upon his oath on the holy gospel, to him, then and there, by me, the justice aforesaid administered, deposeth, sweareth, and on his oath aforesaid, affirmeth and saith, that the aforesaid A. O. on the day of , aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, did [*here again set forth the fact, or so much thereof as is sufficient to convict the offender.*] And thereupon the aforesaid A. O. the day of , aforesaid, in the year aforesaid, before me, the justice aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, is convicted: and for his offence aforesaid, hath forfeited the sum of , to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice, to this present record of the conviction as aforesaid, have set my hand and seal, at , aforesaid, in the county aforesaid, the day and year first above written.

II. If he confesses the fact, then, after the words "charged upon him in form aforesaid," say: and because the said A. O. hath nothing to say, nor can say any thing in his own defence, touching and concerning the premises aforesaid; but doth of his own accord, freely and voluntarily acknowledge and confess all and singular the said premises, to be true, in manner and form as the same are charged upon him in the said information: and because all and singular the premises being heard and fully understood by me, the said justice, it manifestly appears to me, that the said A. O. is guilty of the

offence aforesaid, in manner and form, as in the said information is above charged. And thereupon the aforesaid A. O. the day of , aforesaid, in the year aforesaid, before me the justice aforesaid, by his own confession, according to the form of the statute aforesaid is convicted: and for his offence aforesaid hath forfeited the sum of , to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice to this present record of the conviction as aforesaid, have set my hand and seal, at , aforesaid, in the county aforesaid, the day and year first above written.

III. If the party hath been summoned, and doth not appear, then, after stating the information, say: whereupon, on the said day of , in the year aforesaid, at aforesaid, in the county aforesaid, he the said A. O. was duly summoned in this behalf, to appear before me, in order to make his defence against the said charge as aforesaid: therefore I the said justice, on the said day of , in the year aforesaid, at , aforesaid, in the county aforesaid, do proceed to examine into the truth of the said complaint; and A. W. of , a credible witness, cometh before me the justice aforesaid, and before me the same justice, upon his oath, on the holy gospel, to him, then and there, by me, the justice, aforesaid, administered, deposeth, sweareth, and on his oath aforesaid, affirmeth and saith, that the aforesaid A. O. on the day of , aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, did [*here again set forth the fact, or so much thereof as is sufficient to convict the offender.*] And thereupon the aforesaid A. O. the day of aforesaid, in the year aforesaid, before me, the justice aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute afore-

said, is convicted; and for his offence aforesaid, hath forfeited the sum of , to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice, to this present record of the conviction as aforesaid, have set my hand and seal at , aforesaid, in the county aforesaid, the day and year first above written.

(N. B. This article is an abstract of Boscowen's treatise on convictions on penal statutes; to which book I refer for the authorities.)

CORONER.

THE Coroner's is a very ancient office at the common law. He is called *coroner* because he hath principally to do with what in England are called pleas of the crown, or such wherein the king is more immediately concerned. He is there still chosen by the free-holders of the county.

The office and power of the coroner, like those of the sheriff, are either judicial or ministerial, but principally judicial. This is in a great measure ascertained by the statute of the 6th of Edward the first, concerning the duty of coroners, the provisions of which have been for the most part introduced in the statute of this territory concerning coroners.

It consists principally in enquiring when any person is slain, or dies suddenly or in prison, concerning the manner of his death: and there are a great many enquiries directed in the statute, to which it is proper that the coroner should always call the attention of the jury, before they proceed on their inquisition. This must be taken *on the view of the body*, for if it be interred he must dig it up; and if the body be not found, the coroner cannot

sit, but the justices of the peace shall enquire thereof. He must also sit at the very place where the death happened; and his enquiry is made by a jury, over whom he is to preside. It is not necessary, however, that the inquisition be taken in the very same place where the body was viewed; but they may adjourn to a place more convenient. If any one be found guilty by this inquest of murder, he is to commit him to prison for his trial. But whereas it would be impossible in this southern climate for a coroner to come from a distant part of a large county, and summon a jury to hold an inquest over a dead body, whilst it remained in a condition fit for examination; it is provided in case of the coroner not being near; his duties and powers shall devolve on a neighbouring justice.

It is an indictable offence, to bury a man that dies a violent death, before the coroner's inquest have sat upon him.

It is the duty of the coroner to enquire of the death of all persons who die in gaol, that it may be known whether they died by violence or unreasonable hardships, and the jury ought to consist partly of prisoners, and partly of other citizens.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant) the process must then be awarded to the coroner, instead of the sheriff, for execution of writs issuing out of the courts of justice.

He pronounces the judgment of out-lawry, where a defendant has been called at five successive courts, if he do not appear.

A coroner must execute his office in person, and not by deputy.

Coroner's precept to summon a jury.

Washington County. } The Miſſiſſippi Territory of the United States to the Sheriff of the ſaid County, (or the Conſtable of in the ſaid County.)

THESE are to require you immediately upon ſight hereof, to ſummon and warn good and lawful men of the ſaid county, to be and appear before John Pierce, eſquire, the coroner of the county aforeſaid, at in the ſaid county, on the day of , then and there to enquire of, do and execute all ſuch things as ſhall be lawfully given them in charge, touching the death of A. D. And be you there at that time, to certify what you ſhall have done in the premiſes, and further to do and execute, what ſhall be then and there enjoined you. Given under the hand and ſeal of the ſaid John Pierce, on the day of , in the year of our Lord

Juror's oath.

YOU ſhall diligently enquire and true preſentment make on behalf of the Miſſiſſippi territory of the United States, how and in what manner A. D. here lying dead, came to his death, and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence. *So help you God.*

Inquiſition of Murder.

Miſſiſſippi Territory, Waſhington County. } AN inquiſition indented, taken at , in the county of , aforeſaid, the day of , in the year of our Lord, before me, A. C. gentleman, coroner of the ſaid territory, for the county aforeſaid, upon the view of the body of A. D. then and there lying dead, upon the oaths of A. B. C .D. E. F. &c. good and lawful men of the county aforeſaid; who being ſworn and charged to en-

quire on the part of the territory, when, where, how, and after what manner, the said A. D. came to his death, do say, upon their oath, that one A. M. late of aforesaid, gentleman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the day of , in the year of our Lord , at the first hour in the night of the same day, with force and arms, at , in the county aforesaid, in and upon the aforesaid A. D. then and there being in the peace of God, and of the said territory, feloniously, voluntarily, and of his own malice aforethought, made an assault; and that the aforesaid A. M. then and there with a certain sword, made of iron and steel, of the value of 5*s*. which he the said A. M. then and there held in his right hand, the aforesaid A. D. in and upon the left part of the belly of the said A. D. a little above the navel of the said A. D. then and there violently, feloniously, voluntarily, and of his malice aforethought, struck and pierced, and gave to the said A. D. then and there, with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound, of the breadth of half an inch, and of the depth of three inches; of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace and dignity of the U. S. and of this their territory.

And the said jurors further say, upon their oath aforesaid, that A. A. of , yeoman, and B. A. of , yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid, in form aforesaid committed: that is to say, on the said day of in the year of our Lord aforesaid, at aforesaid, in the coun-

ty aforesaid; at the first hour in the night of the said day; then and there comforting, abetting and aiding the said A. M. to do and commit the felony and murder aforesaid, in manner aforesaid, against the peace and dignity of the United States, and of this their territory.

Moreover the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, and the jurors aforesaid, upon their oath, aforesaid, do say, that the said A. M. at the time of doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day of , in the year of our Lord , and at the place first above-mentioned.

A. C. Coroner.

A. B.
C. D.
E. F. &c. jurors.

An inquisition on one non compos mentis.

, who say, upon their oath, that the aforesaid A. D. on the day and year aforesaid, and at the time of his death; to wit, from the day of , to the time of his death, and at the time of his death aforesaid, was a lunatick, and a person of insane mind, as aforesaid, did on the day of , come alone to a certain river, called , in the said county; and did then and there cast himself into the said river, and drowned himself in the water of the said river. And

so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A. D. from the cause aforesaid, in manner and form aforesaid, came to his death, and not otherwise. In witness, &c.

For killing another in his own defence.

, upon their oath say, that A. K. lately of , gentleman, at , aforesaid, in the said county, on the day of in the year of our lord , in the peace of God, and of this territory, then being, A. M. late of ; in the county of , at the hour of , in the afternoon of the same day, did come, and upon him, the said A. K. then and there, of his malice aforethought, did make an assault, and him the said A. K. did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one W. H. in aforesaid, to a certain place called ; in the county aforesaid; and the said A. K. seeing that the said A. M. was so maliciously disposed, to a certain wall in the said place called , did flee, and from thence for fear of death, could not escape, and so the said A. K. himself, in preservation of his life, against the said A. M. continued to defend, and in his own defence, him the A. M. upon the right part of the breast of him the said A. M. with a certain sword, of the price of one shilling, which the said A. K. then and there held in his right hand, did strike, then and there giving to the said A. M. one mortal wound, of the breadth of one inch, and of the depth of three inches; of which said mortal wound the said A. M. at , aforesaid, in the county aforesaid, languished, and languishing lived, from the said day of to the day of , from thence next ensuing; and that the said A. M. on the said day of ; in the year aforesaid, at afore-

said, in the said county, of that mortal wound died; and so the said A. K. did then and there kill him the said A. M. in his own defence.

An inquisition where one hangs himself.

—As above, to— , not having God before his eyes, but being seduced and moved by the instigation of the devil, at aforesaid, in a certain wood, at aforesaid, standing and being, the said A. D. being then and there alone, with a certain hempen cord, of the value of 3d. which he then and there had and held in his hands, and one end thereof put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice aforethought, hanged and suffocated: and so the jurors, aforesaid, upon their oaths, aforesaid, say, that the said A. D. then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice aforethought, himself killed, strangled and murdered, against the peace, &c.

Where one dies a natural death.

the said A. D. on the day of in the year aforesaid, in the county aforesaid, to wit, in a certain place called was found dead; that he had no marks of violence appearing on his body, and died by the visitation of God, in a natural way, and not otherwise. In witness, &c.

On one drowned by accident.

that the said A. D. on the day of in the year aforesaid, in the county aforesaid, going into the river to bathe himself; it so happened that accidentally, casually, and by misfortune, he the said A. D. was in the water of the said river then and there suffocated and drown-

ed: of which said suffocation and drowning, he, the said A. D. then and there instantly died. And so the jurors aforesaid, do say that the said A. D. in manner and by the means aforesaid, accidentally, casually and by misfortune, came to his death, and not otherwise. In witness, &c.

Of murder, where the murderer is unknown.

The same as in the first form, only say, that a certain person unknown, &c. *and add:* And the said jurors upon their oath aforesaid, further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did flee away, against the peace, &c.

DEPOSITIONS.

JUSTICES of Peace are frequently appointed by commissions, issuing out of the county and superior courts, to take depositions; and therefore it may not be amiss to say something about the manner in which such depositions are to be taken.

When a commission is delivered to those appointed in it, they or he, if but one, should issue a subpœna, directed to the sheriff or constable, commanding him to summon the witness or witnesses named in the commission, to attend at the day and place mentioned in the notice, to give evidence between the parties named in the commission.

If the witness refuses to be sworn, the commissioner or commissioners may commit him to the common jail, there to remain until he shall be willing to give testimony in such a manner as the law directs.

If the witness appears, then require the party in whose behalf the deposition is to be taken, to pro-

duce a copy of the notice served on the adverse party; and also the rule or order made in the court for taking such deposition: and if it appear such notice has been served the length of time mentioned in such order, and that the notice has specified the day and place, then present for taking of the same: then if both parties be present, or their agents, proceed to take the deposition; or if one only be present, then wait till the latter part of the day, if only the day be specified in the notice: but if the notice specify certain hours of that day, then wait as late as you can, so as you give yourself time enough to take the deposition; and then proceed to take the deposition.

If both parties are present, specify the same in the caption of the deposition, thus: pursuant to the annexed commission, to us, or to me directed, at the house of such a man, in such a county, and on such a day, or between such and such hours of such a day; both parties being present, namely, such an one, and such an one; or such an one, agent or attorney for such an one: I, or we proceeded to take the following deposition of A. B. being of such an age, who having been first duly sworn, or having first affirmed in due form of law, to depose the truth, the whole truth, and nothing but the truth, between the said parties named in the said commission, deposeth and saith as follows: to wit:

[As the witness swears.]

Here put down every thing material the witness says, and after he has done, then call upon the adverse party to cross examine him; and put down the material questions he asks, and the material answers of the witness, until you have gone through: then put down the material questions asked by the plaintiff, and the answers, in like manner; then read the whole over to the witness distinctly, and

let him correct himself where you have mistaken his meaning; and after you have gone through all the corrections, then read it over to him again.

Then say, sworn before us or me, on the time, and at the place above specified.

Then sign your name on the left side of the page, immediately after, and under the last clause above mentioned. Let the witness sign his name also, on the right side of the page. If he cannot write, he must make his mark.

When all is done, then seal up the deposition, and other affidavits, with the commission thereto annexed, and direct the same to the court from whence the commission issued.

Regularly, when thus sealed up, it should be delivered to the party for whom taken: but if there is any cause to suspect he will not deliver it into court, then a copy of the whole should be taken, signed and attested as above directed, in all particulars; and delivered to the other party also; or the commissioner may deliver it with his own hands into the court; and then no copy need be made out.

(Haywood.)

ESCAPE.

IF a person arrested, gain his liberty before he is delivered by due course of law, he is said to escape: and this may happen either in civil cases, or in criminal ones.

I. *Of escapes in civil cases.*

Where a defendant is regularly arrested, he must either go to prison for safe custody, or put in bail to the sheriff. The sheriff may indeed let him go without any sureties, but that is at his own peril.

But when a defendant is once in custody upon a writ of execution against his body, he is to be kept in close and safe custody: and if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though upon arrests, and what is called *mesne* process, being such as intervenes between the commencement and end of a suit, the sheriff may indulge the defendant as he pleases, so as he produces him in court to answer the plaintiff at the return of the writ: yet upon a taking in execution, he never can give any indulgence; for in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper; after which he never can retake his prisoner again; though the plaintiff may retake him at any time, but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent; and then upon fresh pursuit the defendant may be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape. A rescue of a prisoner *in execution*, either going to gaol, or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of, and answering for the escape; for he ought to have sufficient force to keep him since he may command the power of the county.

II. *Of escapes in criminal cases.*

An escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is an offence against public justice, and the party himself is punishable by fine or imprisonment. But the officer permitting such escape, either by negligence or connivance, is

much more culpable than the prisoner: the natural desire of liberty pleading strong in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice. Officers therefore, who, after arrest, *negligently* permit a felon to escape, are also punishable by fine; but voluntary escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass: and this, whether he were actually committed to gaol, or only under a bare arrest.

But the officer cannot be *thus* punished, till the original delinquent hath actually received judgment, or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for treason or felony; and the person arrested and escaping, might turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty, may be fined and imprisoned for a misdemeanor.

The distinction, with regard to the powers of a sheriff or gaoler, in civil and criminal cases, is of the utmost importance. He cannot in a criminal case admit a prisoner to his liberty for a single hour, whatever confidence he may place in his honor. It is even an escape to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody; or to permit a prisoner to go out of the limits of the prison.

Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself

in a house, the doors may be broken open to take him on refusal of admittance.

See Statutes, p. 319, 320.

EVIDENCE.

ALTHOUGH there is not any necessity, when a felony has been committed, that there should be the same strength of evidence, either as to quantity or quality, against any person accused, to justify a magistrate in holding him over to take his trial, as there is to produce his final conviction: yet a knowledge of the rules of evidence, cannot even in this part of his judicial functions, be by any means unimportant to a justice of the peace. But when it is considered, that he has the power of finally determining on the guilt or innocence of persons accused of certain inferior offences; and that he has likewise cognizance of civil suits for sums not exceeding twenty dollars; it is evident, that without some knowledge of the principles which are to guide a court of justice in the admission of testimony, he cannot by any means safely or satisfactorily discharge his official duty.

To enter into a minute illustration of the rules of evidence, would indeed be impracticable, without swelling this volume to an unreasonable bulk. I shall therefore merely recite the leading principles, and for a further discussion of them as well as for the authorities on which they are founded, must refer the reader to an essay which I have lately published, entitled, "A summary of the Law of Evidence in criminal prosecutions."

It is the first and most signal rule in relation to evidence, that *a man must produce the utmost evidence that the nature of the fact is capable of.* The true meaning of which rule is this; *that no such*

evidence shall be brought as from the nature of the thing, supposes still greater evidence behind, in the party's own possession and power.

There are two kinds of testimony; viz. written and parol, or unwritten. Different opinions have been entertained which of these two is to be preferred in the scale of probability. No general principle, can perhaps, be laid down on this subject. Each has its peculiar excellencies and defects, according to the nature of the subject to which it is applied. Much must depend on the complexion of the facts, which are to be established, upon the distance of the time at which they happened, and upon the circumstances under which the oral testimony is delivered; or under which the written testimony was originally received, and is afterwards preserved.

OF WRITTEN EVIDENCE.

1. Of all kinds of written evidence, records are of the highest authority.

2. Copies of records are allowed in evidence.

3. But a copy of a copy is no evidence.

4. Of general acts of the legislature, the printed statute book is evidence; but it is otherwise of private acts, though reduced into the same volume with the general statutes; but the party ought to have a copy compared with the original roll.

5. A general law is taken notice of by the judges and jury without being pleaded; but a particular law is not taken notice of by the court without being pleaded.

6. Copies of the records of a court under the seal of the court, and which are called exemplifications, are of higher credit than sworn copies.

7. Where a record is lost, a copy of it, if confirmed by age, and judicial notoriety, may be given in evidence, without swearing a true copy.

8. Where the record is pleaded, and appears in the allegations, it must be tried on the issue, "nul-tiel record:" but where the issue is upon fact, the record may be given in evidence, to support that fact.

9. If a verdict be had on the same point and between the same parties, it may be given in evidence.

10. A record of conviction of treason, felony or any other crime infamous in its nature, is a conclusive exception to the competency of a person so convicted when offered as a witness.

11. If the principal and accessary are joined in one indictment and tried together, the accessary may enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law, tending to his acquittal. But if the accessary be brought to trial after the conviction of the principal, it is sufficient if the indictment recite, with proper certainty, the record of the conviction.

12. *On an indictment for perjury, the postea of a former issue;* that is, that part of the record which contains the history of the cause from the time that issue is joined, and a trial awarded, *is good evidence that there was a trial.*

13. A bill in chancery is evidence against the complainant, where there have been proceedings upon it: for the allegations of every man's bill shall be supposed to be true.

14. The answer is evidence against the defendant, and carries higher weight of probability with it, because this is delivered in upon oath.

15. An office copy of an answer to a bill in equity may be given in evidence in a civil suit, but not on an indictment for perjury.

16. A man's mere voluntary affidavit may be read in evidence against the person who made it;

but the original must be produced, and it must be proved that it was sworn.

17. The books of public offices and of public bodies, which of course are not interested in the event of the trial, are admissible evidence.

18. The mere comparison of hand writing is not admissible evidence in criminal prosecutions.

19. But papers found in the custody of the defendant, and the writing thereof being proved to be his hand by persons who have seen him write, is sufficient preliminary evidence to entitle the public prosecutor to have them read.

20. In proving the hand-writing of a defendant, there is no distinction between that which is legal evidence in a civil action, and that which is legal evidence in a criminal prosecution; that which is evidence in one, whether a capital offence, or misdemeanors, being evidence in the other.

21. Letters written and forwarded on their way for the purpose of a treasonable correspondence, whether found in the possession of the defendant, or intercepted or stopped in the post-office, may be read in evidence against him, on a charge of levying war, or adhering to the enemies of the commonwealth, to prove the treason.

22. Where witnesses have been examined before the coroner, or a justice of the peace, in conformity to the statutes, regulating such examinations, and are dead, or not able to travel, and oath is made thereof; then the examination of such witnesses, so dead, or unable to travel, may be read; the coroner or justice first making oath, that such examinations are the same which he took upon oath, without any addition or alteration whatsoever. So in case oath should be made, that any witness, who has been so examined by the coroner or justice, and is absent, has been detained by means and procurement of the prisoner; then the examination

may be read; but whether he was detained by the means or procurement of the prisoner, is matter of fact.

OF PAROL EVIDENCE.

The most important branch of evidence, as being of most constant use in criminal prosecutions, is that of living witnesses, personally appearing in a court of justice. There are some, however, whom the cautious prudence of the law, has excluded or excused from bearing testimony, and who on this account, are said to be incompetent witnesses.

I. *Of incompetency arising from mental incapacity.*

1. An idiot or lunatic, or as he is technically denominated, person of "*non sane memory*," cannot be a witness whilst he is under that insanity. But if he have intervals of understanding, he may, during those intervals, be a witness. It is difficult, however, to determine what degree of insanity shall thus disqualify the person labouring under it.

2. But a person deaf and dumb, to whose mind there has been conveyed a knowledge of the Deity, and a belief in future rewards and punishments, may be examined as a witness, through the medium of a person capable of conversing with him by signs.

3. Children under the age of fourteen years, are not presumed, without examination, to be of the age of discretion to be sworn witnesses, and therefore, are not, *of course*, admitted.

4. Where an infant is admitted as a witness, he must be sworn.

5. A person who has no idea of a God or of religion, who is altogether ignorant of the obligation of an oath, the existence of another world, and a future state of rewards and punishments, ought not to be sworn, or admitted.

II. *Incompetency arising from the rejection of Christian principles.*

1. An atheist, who professes to have no belief in the existence of a God, and of course disbelieves a future state of rewards and punishments, cannot be a witness.

2. Jews, being sworn to the Old Testament, are admissible witnesses.

3. A pagan, of any description, sworn according to the ceremonies of the religion which he professes, is an admissible witness, in a cause, civil or criminal.

4. Indians and negroes are excluded in certain cases, by act of Assembly.

III. *Incompetency arising from infamy of character.*

1. Persons who are stigmatized, are excluded from giving testimony: viz. all those convicted of treason, felony, and every case of the *crimen falsi*; as perjury, forgery and the like.

2. It is the infamy of the crime, and not of the punishment, which disqualifies a man from being a witness.

3. Where the conviction and judgment is for an offence recognized by law as infamous in its nature, though not attended by what is termed infamous punishment; yet the delinquent is rendered incompetent to give evidence in a court of justice.

4. A judgment is necessary to complete incompetency, but the execution thereof is not.

5. No conviction and judgment can be made use of to set aside a witness as incompetent, unless the record be actually produced in court.

6. Judgment for an infamous crime, which renders a man incompetent as a witness, doth not disable him from making an affidavit in defence of a charge brought against him.

7. But he is not allowed to support a complaint, or to do other acts of a judicial nature upon his own oath.

8. By a statute pardon, every one within that pardon is restored to competency, and is to be considered as received into society as a person of credit.

9. A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness.

10. Where the offence is of such a nature, that incompetency to be a witness is an express part of the judgment against the person convicted of it; there a pardon will not restore his competency.

IV. *Of incompetency arising from professional situation.*

1. Those who are professionally engaged, as of counsel for a party, or as solicitor, attorney or other law agent, are not at liberty to disclose those facts, of which they are possessed, by virtue of such confidential character.

2. But they may be examined as to facts which have come to their knowledge, not through the medium of professional confidence.

3. This privilege, or rather incapacitation, is to be understood of *law agents* only; but not of agents in a popular and general sense; otherwise it might be most inconveniently extended to stewards, and even to common servants.

4. Where the party calls upon his attorney as a witness, the other party may cross examine him; but that must be only relative to the same matter, and not to the other points of the cause.

5. It is no exception against a person giving evidence, either for or against a prisoner, that he is one of the judges or jurors who are to try him.

V. *Of incompetency arising from a person's being interested.*

1. It is in general, a good exception against a witness, that he is to be either a gainer or loser by the event of the cause; whether such advantage be direct and immediate, or consequential only.

2. Although the rule, that no man can be a witness for himself, is universal in civil matters; yet it does not exclude the party who prosecutes, in the name of the commonwealth, in right and behalf of the public.

3. Though there are certain cases, in criminal as well as in civil prosecutions, in which an interested party cannot be a witness; yet the interest which shall be admitted to disqualify a witness must be clear and apparent: and the law will not permit so forced and violent a presumption to be raised, as that a witness is guilty of a crime in order to afford ground for an objection to his competency on the score of interest.

4. It is no good exception against a witness, that he has a maintenance from the government; for every one may maintain his own witnesses.

5. Illegal interest is not to be presumed. The law will not presume an interest contrary to the legal or constitutional quality of the citizen.

6. Where, from the nature of the subject, proof cannot otherwise be expected, a party shall be admitted as a witness, whose interest otherwise is sufficient to exclude him.

Thus the party robbed, is evidence to charge the hundred.

7. The men of one county, city, hundred, town, corporation, or parish, are evidence in relation to the rights, privileges, immunities and affairs of such town, city, &c. if they are not concerned in private interest, in relation thereunto; nor advantaged by such rights and privileges as they assert by their attestation.

8. A naked trust doth not exclude a man from being a witness.

9. Where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he may not by this subsequent act, deprive the plaintiff or defendant of the benefit of his testimony.

VI. *Of incompetency arising from domestic relations.*

1. No relation is excluded from giving evidence, by the laws of England, but a husband or wife; because there is not between any other relations the same absolute unity of interest.

2. Neither a husband nor wife can be admitted to be a witness for or against the other. But the dying declarations of a husband or wife, if in life's last extremity, and conscious of approaching dissolution, may be received in evidence. The casual declarations of a wife out of court, have likewise been suffered to be proved against her husband.

3. It is a lawful marriage only which destroys the competency of the parties married, as witnesses for or against each other.

4. Where a husband or wife have cause to demand sureties of the peace against the other, either may give evidence against the other of the cause on which such sureties are demanded.

5. In a criminal case, where the wife is the party aggrieved, and on whose person the crime is committed, she is a competent witness against her husband.

Of confession.

1. In cases of felonies and misdemeanors, if a confession of a prisoner be voluntarily made and regularly proved at the trial, it is sufficient if the jury believe it to be true, to convict the prisoner, without any corroborating evidence to support it.

2. But whenever a man's evidence is adduced against him, it is an unquestionable principle of reason and justice, that the whole of it should be taken together.

3. The confession of one person cannot be received as evidence against others.

4. But though a free and voluntary confession, clearly proved, is deserving of the highest credit, under the reasonable presumption, that it flows from a sense of guilt; yet a confession forced from the lips by the influence of hope or fear, cannot be regarded as any genuine evidence of facts; and is therefore not admitted in a court of justice.

5. But the principle upon which confessions, improperly obtained, are not admissible, will not apply to facts which are ascertained in consequence of such confessions. Their truth or falsehood cannot be affected by any bias which may have actuated the mind of the accused at the time of his making these disclosures, which led to the discovery of such facts.

Of the number of witnesses necessary to convict a criminal.

1. The common law, varying in this respect from the civil law, requires the oath of only one credible witness to any felony, except in cases where there is a natural and evident propriety in requiring the testimony of two.

2. In like manner the constitution of the United States provides, "that no person shall be convicted "of treason, unless on the testimony of two wit-"nesses, to the same overt act; or on confession "in open court."

3. Another exception to the general rule of the sufficiency of one witness to a conviction, is in the case of perjury; and this results not from positive statute law, as in the case of treason, but from the

peculiar nature of the offence itself. Here the law requires two witnessses, because the oath of the accuser is placed in opposition, not merely to the plea of *not guilty*, on the part of the accused, but to the oath itself of the accused person, in a judicial proceeding; and in such an equilibrium of evidence, it is but reasonable, that the scale of innocence should be presumed to preponderate.

4. This principle, however, can extend only to so much of the evidence as goes to contradict the oath in question; for as to the fact; that such an oath was taken, it may be established by the same degree of evidence as would be sufficient to establish any other fact of a similar nature.

WHAT MAY BE GIVEN IN EVIDENCE.

It will be proper to shew what things may be given in evidence, or to delineate the nature and quality of the evidence itself.

I. *Of matters of opinion.*

1. The principal cases in which matters of opinion can be given in evidence, are those in which a court will avail itself of the knowledge and judgment of medical practitioners, for the purpose of ascertaining facts, which especially fall within the limits of their professional enquiries and experience.

2. Another case in which the *opinion* of a witness is suffered to be given in evidence, is, in the proof of hand writing. For though I may frequently have seen a man write, yet my testimony, that any particular signature which I did not see him write, is really his hand writing, can only be a matter of opinion; and that too, by no means a clear and decisive one; as we have abundant examples of the utmost nicety in imitating the signature of particular persons. But where there is a miscellaneous piece of writing, the *general character*

of which is considered by a witness of competent skill, to resemble the writing of a person whom he has frequently seen write; there the opinion of such a witness must have great weight; and courts of justice have in both cases, admitted such testimony: though rejecting *mere* comparison of hands, they will not suffer two papers, one of which is proved to be the hand writing of a party, to be delivered to the jury for the purpose of comparing them together.

II. *Of matters of belief.*

A deposition, says lord Coke, must be direct and absolute; and not *as he thinks*, nor *as he remembers*, nor *as he believes*.

III. *How far matters of hearsay may be given in evidence.*

1. It seems to be agreed, that what a stranger has been heard to say, is in strictness, no manner of evidence, either for or against a prisoner; not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination; and therefore it seems to be a settled rule, that it shall never be made use of but only by way of inducement or illustration of what is properly evidence.

2. Yet on certain questions, particularly of a civil nature, hearsay is full evidence, when from the nature of the subject no other can be expected: as in common opinion to general characters, which rests upon general estimation, but otherwise of particular facts. So of a prescription, which excluding direct proof from written evidence, and running beyond the reach of present knowledge, is well proved by referring to the account given by disinterested parties long since dead. And yet in cases of prescription, those very persons who are

permitted to give evidence of what they may have heard from dead persons, respecting the reputation of the right, are not permitted to state facts of the exercise of the right, which the deceased person said they had seen.

3. What a witness hath been heard to say at another time, may be given in evidence, either to invalidate the testimony which he gives in court, or to confirm it, by shewing that on former occasions he has declared agreeably to his present evidence. It was admitted in the lord Stafford's trial, that the depositions taken by a witness before a justice of the peace, might at the prisoner's desire, be read at the trial. in order to take off the credit of the witness, by shewing a variance between such depositions and the evidence given in court, *viva voce*.

4. Parol proof cannot be given of what a deceased person said on his death bed, touching the cause of his death, when it appears that those declarations have been reduced to writing, and might have been so given in evidence. But where they have not been so reduced to writing, parol evidence is admissible; though the credit of it much depends on the memory and temper of the witness by whom it is related.

5. In civil cases likewise, the declarations of dying persons have been admitted, and evidence that a subscribing witness to a will or instrument, *acknowledged* upon his death bed to the person giving the evidence, "that he the subscribing witness did "himself forge it," has been suffered to be brought forward at the trial.

6. But the declaration of a convict at the place of execution cannot be given in evidence, as the declaration of a dying person. Such a person, if he appeared personally in court, and was ready to be sworn, would not be admitted as a witness; and it would therefore be very inconsistent, that a re-

port of his declarations at the gallows should be received in a court of justice.

7. Another case in which verbal declarations made not under the solemnity of an oath, may be given in evidence, is when they have been made by the prisoner himself, and afford a presumption of his guilt. What the prisoner hath been heard to say at another time, may be given in evidence against him: but though he may have denied the fact with which he is charged, this denial cannot be given in evidence for him; nor can a witness for this purpose be called in his defence: but the prisoner may cross-examine any of the witnesses on the part of the prosecution, as to any thing they may have heard him say, relating to the fact with which he is charged.

IV. *Of matters appearing on a former trial.*

The evidence given by a witness at one trial, cannot in the ordinary course of justice, be made use of against a defendant, on the death of such witness, at another trial. Nor can depositions, taken in a suit of a different nature, and in a court of civil jurisdiction, be read in a criminal prosecution.

V. *Of matters irrelevant to the issue.*

As evidence signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other; no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond, by the plea, that *he never executed it;* and the issue is, whether it be the defendant's deed or not, he cannot give a release of this bond in evidence; for that does not destroy the bond, and therefore does not prove the issue which he has chosen, to rely upon, viz. that the bond has no existence.

VI. *Of matters relating to character.*

1. A prisoner may examine witnesses as to his general character. This has been the general practice in capital cases.

2. A witness too, in giving a general character in favour of a prisoner, may assign the reasons on which he gave that character.

3. In a civil suit, the character of either party cannot be called in question, unless it be put in issue by the very proceeding itself.

4. But in an action for criminal conversation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a bastard before marriage; because by bringing the action, the husband puts her general behaviour in issue: but the defendant cannot prove any instance of her misconduct, subsequent to the act alledged against him.

5. So in criminal cases, where the defendant's character is put in issue by the prosecution, the prosecutor may examine into particular facts; for it is impossible without it to prove the charge. Yet there is one case of that sort, in which the prosecutor is not allowed to examine to any particular fact, without giving previous notice of it to the defendant; and that is where a man is indicted for being a common barrator.

6. But in other cases the prosecutor cannot enter into the defendant's character, unles the defendant enable him so to do, by calling witnesses in support of it: and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally.

7. The credit of a witness can only be impeached, by general accounts of his character and reputation, and not by proofs of particular crimes, of which he was never convicted.

8. But though only *general evidence* can be given as to his *general character*; yet declarations made by him on the same subject, contrary to what he swears on the trial, may be given in evidence to impeach his credit.

9. A party shall never be permitted to bring even general evidence to discredit his own witness: but if his witness prove facts which makes against him, he may call other witnesses to shew that these facts were otherwise.

VII. *Of matters tending to self accusation.*

No man can be compelled to give evidence, the tendency of which is to charge himself with a crime. It has also been held, that this rule of law protects a man's pecuniary interests, as well as his person, from punishment: and that therefore he is not compellable to give any answer which may subject him to a civil action, or charge himself with a debt.

EXAMINATION.

WHEN a person is brought before a justice of the peace to be examined, with regard to some felony laid to his charge, and it be out of the power of the justice immediately on the return of the warrant, to take the examination, he may by word of mouth command the constable, or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable, or any other person, without shewing the particular cause for which he was to be examined; or any warrant in writing. But the time of the detainer must be no longer than is necessary for such purpose.

The examination of the person accused ought not to be upon oath. But if upon his examination, he shall confess the matter, it shall not be amiss that he subscribe his name or mark to it. Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others.

If other witnesses be brought at the same time before the justice, their information must be upon oath, and such information being upon the trial sworn to be truly taken, by the justice or his clerk, may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

The justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner; for such information, evidence, or proof so taken, is only to inform the court of the truth of the matter.

It is their duty to bind the witnesses by recognizance, and upon refusal, they may commit the person refusing.

Examination of a felon.

Washington. THE examination of A. O. of ; yeoman, taken before me J. J. esquire, one of the justices of the peace for the said county; the day of ; in the year of our Lord .

The said A. O. being charged before me, by A. I. of , yeoman, with the felonious stealing out of the house of the said A. I. at , on the day of , the following goods: to wit: ; of the value of . He the said A. O. upon his examination now taken before me, confesseth that , [or denieth that &c.]

Recognizance to give evidence.

Washington. BE it remembered, that on the day of , in the year of our Lord , A. I. of , in the said county, yeoman, did come before me, J. J. esquire, one of the justices assigned to keep the peace in the said county; and did acknowledge himself to owe to the governor of the Mississippi territory the sum of , under condition that he shall personally appear at the next superior court of criminal jurisdiction, to be holden in and for the said county; then and there to give evidence in behalf of , against A. O. late of ; who being attached and suspected of felony, is now committed to the public gaol in the said county; then this recognizance to be void, otherwise of force.

Warrant for a witness.

Washington. } To the constable of

WHEREAS oath hath been made before me, J. J. esquire, one of the justices of the peace, in and for the said county, by A. I. of ; yeoman, that he the said A. I. was lately robbed at ; and that he hath good cause to believe that A. W. of is a material witness to prove by whom the said robbery was committed; these are therefore to require you to cause the said A. I. forthwith to come before me, to give such information and evidence as he knoweth concerning the said offence, that such further proceeding may be had therein, as to the law doth appertain. Given under my hand and seal, at , in the said county, the day of , in the year of our Lord

EXECUTION.

EXECUTION is putting the sentence of the law in force. I will offer a few observations with respect to execution in civil cases, and in criminal ones.

I. *As to execution in civil cases.*

If the plaintiff recovers in an action, real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin of a freehold; or an *habere facias possessionem*, or writ of possession of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which, the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of a seizin, is sufficient execution of the writ.

In other actions, where the judgment is that something in special be done, or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. As, upon an assize of nuisance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment. Upon a replevin, the writ of execution is the writ *de retorno habendo*: and if the distress be eloigned, the defendant shall have a *capias in withernam*: but on the plaintiff's tendering the

damages, and submitting to a fine, the process *in withernam* shall be stayed. In detinue, after judgment, the plaintiff shall have a *destringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels: or else a *scire facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and if the defendant still continues obstinate, then, if the judgment hath been by default or on demurrer, the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages: which being either so assessed, or by the verdict in case of an issue, shall be levied on the person and goods of the defendant.

Executions in actions where money only is recovered, as a debt or damages, and not any specific chattel, are of five sorts; either against the body of the defendant, or against his goods and chattles, or against his goods and the profits of his lands; or against his goods and the *possession* of his lands: or against all three, his body, lands, and goods.

The first of these species of execution, is by writ of *capias ad satisfaciendum*; which addition distinguishes from the *capias ad respondendum*, which lies to compel an appearance at the beginning of a suit. And properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*. The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages: it therefore doth not lie against such other persons as could not be originally held to bail.

If an action be brought against an husband and wife, for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and wife in execution: but if the action was originally brought against herself, when sole, and pending the suit she marries,

the *capias* shall be awarded against her only, and not against her husband. Yet if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehaviour of the wife during her coverture, the *capias* shall issue against the husband only.

The next species of execution is against the goods and chattels of the defendant; and is called a writ of *fieri facias*, from the words in it where the sheriff is commanded, *quod fieri faciat de bonis*, that he cause to be made of the goods and chattles of the defendant, the sum or debt recovered.

The sheriff may not break open any outer doors, to execute either this, or the former writ; but must enter peaceably, and may then break open any inner door, belonging to the defendant in order to take the goods. And he may sell the goods and chattles, even an estate for years, which is a chattle real of the defendant, till he has raised enough to satisfy the judgment and costs: first, paying the landlord of the premises upon which the goods are found, the arrears of rent then due not exceeding one year's rent in the whole. If part only of a debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.

A third species of execution is by writ of *levari facias*; which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. Little use is now made of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual.

The fourth species of execution is by the writ of *elegit*; which is a judicial writ, given by the statute

Westm. 2. 13 Edw. I. c. 18; and adopted in the execution law of this territory; either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance, taken in a court of justice. By the common law, a man could only have satisfaction of goods, chattles, and the present profits of the lands, by the two last mentioned writs of *fieri facias*, or *levari facias*; but not the possession of the lands themselves; which was a natural consequence of the feudal principles, which prohibited the alienations, and of course the incumbering of the fief with the debts of the owner. And when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits: so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute, therefore, granted this writ, called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former, by which the defendant's goods and chattles are not sold, but only appraised: and all of them except oxen and beasts of the plough, are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff: to hold, till out of the rents and profits thereof, the debt be levied, or till the defendant's interest be expired; as, till the death of the defendant, if he be tenant for life or in tail. Wherever judgment is given, it immediately binds a moiety of the lands; and if there be two judgments of the same term, they each bind a moiety, and therefore each shall extend a moiety: viz. both of them the whole, for they have no priority.

During this period, the plaintiff is called tenant by *elegit*. Although lands be extended by *elegit*, the wife of the debtor, at the time of the extent made, shall recover dower thereof.

This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken; but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*: for such *elegit* is in this case, no more in effect than a *fieri facias*. So that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject, in the course of the comon law.

This, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept, under the hand and seal of the judge. Afterwards it was established, that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoner's names, with their separate judgments in the margin, which is left with the sheriff.

The sheriff cannot alter the manner of the execution, by substituting one death for another, without being guilty of felony himself.

Upon judgment to be hanged by the neck till he is dead, if the criminal be not thoroughly killed, but revives, the sheriff must hang him again. For the former hanging was no execution of the sentence: and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue.

EXTORTION.

IT is said, that extortion, in a large sense, signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office; either where none at all is due, or not so much is due, or when it is not yet due.

At the common law this offence is severely punishable, by fine and imprisonment, and also by a removal from the office, in the execution whereof it was committed.

FELONY.

THE word felony is probably of Saxon origin, and derived from the word *fellan*, to offend, or *falnisse*, an offence, or failure; although, as it is now become a technical term, it signifieth in a more restrained sense, an offence of a high nature; and is generally but not universally punishable by death, by the common law. Other etymologies, indeed, have become more fashionable, though probably less natural than the one which I have here adopted. Murder, manslaughter, treason, rape, arson, burglary, robbery, larceny, &c. are felonies.

Misprision of felony is the concealing of a felony, which a man knows, but never consented to, and is punishable by fine and imprisonment.

Misprision, in a larger sense, is used to signify every considerable misdemeanor, which hath not a certain name given to it in the law.

Where one knows of a felony, but takes his goods again, or other satisfaction, on the condition of not prosecuting the offender; it is named *theft-bote*, from the Saxon words *theft* and *bote*, or *boot*, or recompence; and is punishable by fine and imprisonment.

Information against a person for felony.

Washington County, To wit: } THE information and complaint of A. I. of , in the county of , yeoman, made on oath before me J. J. esquire, one of the justices of the peace for the said county, the day of , in the year of our Lord ; viz. that yesterday in the night, or early in the morning of this day, divers goods of him, the said A. I. at aforesaid, in the county aforesaid, were feloniously stolen, taken and carried away from the house of him the said A. I. and that he hath just cause to suspect, and doth suspect, that A. O. late of , yeoman, feloniously did steal, take, and carry away the same: [*or otherwise, as the case shall be:*] and thereupon, he the said A. I. prayeth, that justice may be done in the premises.

A. I.

Before me,
J. J.

Warrant for felony.

Washington, To wit. } *The Mississippi territory of the United States, to the constable of*

FORASMUCH as A. I. of , in the county of , yeoman, hath this day made information and complaint, upon oath, before J. P. esquire, one of the justices of the peace for the said county; that this present day divers goods of him the said A. I. at , aforesaid, in the county aforesaid; were feloniously stolen, taken and carried away, from the house of him the said A. I. and that he hath just cause to suspect, and doth suspect, that A. O. late of , yeoman, feloniously did steal, take and carry away the same; [*or otherwise as the case shall be:*] these are there-

fore to command you forthwith to apprehend him the said A. O. and to bring him before the said J. P. esquire, to answer unto the said information and complaint; and to be further dealt with according to law. Herein fail you not. Given under the hand and seal of the said J. J. esquire, the day of ; in the year of our Lord ;

FORCIBLE ENTRY AND DETAINER.

A FORCIBLE entry is when one or more persons, furnished with unusual weapons, do violently enter the house or land of another; or do use violent and threatening words to the terror of another; or some other actual violence or terror; and by that means gain the possession; or if one or more do enter peaceably, and then forcibly put another out of his possession.

A forcible detainer is, when one or more have entered peaceably, and detain the possession with force, with arms, or with an unusual number of people, or with threatenings to defend it.

The force necessary to make an entry or detainer forcible, must not be an implied one, but must be attended with some circumstance of actual violence or terror, as by beating the person in possession, or by breaking open the doors of a house; not the bare drawing of a latch, or pulling back the bolt of a door, or opening it with a key, or going in at a window, if not done with strong hand, or multitude of people; or it may be by a threatening behaviour or speech, at the time of entry; giving those in possession just cause to fear the doing of some bodily hurt; or by carrying with him an unusual number of attendants; or arming himself in a manner which intimates a design of force; or

by threatening to kill, maim or beat, or giving out speeches, implying such a design; as that he will keep the possession in spite of every body, and the like.

The party grieved may have remedy three ways: first, by action of trespass: secondly, at the common law, wherein he shall be fined simply: thirdly, by complaint to a justice of the peace; whose duty thereupon is fully described in the act concerning forcible entries and detainers.

The inquisition, the indictment, or finding of the jury.

Washington. AN inquisition for the Mississippi territory of the United States, taken at , in the said county, the day of , in the year of our Lord , by the oaths of , good and lawful men of the said county, before J. P. esquire, one of the justices of the peace in the said county, who say upon their oaths aforesaid, that A. I. of , aforesaid, yeoman, long since, lawfully and peaceably was seized in his demesne as of fee, [*if it is not freehold, then say possessed*] of and in one messuage, with the appurtenances, in aforesaid, in the county aforesaid: and his said possession, and seisin, so continued until A. O. late of , yeoman, B. O. late of the same, yeoman, and C. O. late of the same, yeoman, and other malefactors unknown, the day of , now last past, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him the said A. I. thereof disseised, and with strong hand expelled from the said messuage, with the appurtenances aforesaid, from the said day of , until the day of the taking of this inquisition, with like strong hand and armed power, did keep out, and do yet keep out, to the great dis-

turbance of the peace of the United States, and of this their territory, and against the form of the statute, in such case made and provided.

We whose names are hereunto set, being the jurors aforesaid, do upon the evidences now produced before us, find the inquisition aforesaid true.

A. B.
C. D. &c.

Warrant to the Sheriff for restitution.

Washington. { *The Mississippi territory of the United States, to the Sheriff of the said County, Greeting:*

WHEREAS by an inquisition taken before J. P. esquire, one of the justices of the peace of the county of Washington, at ; in the county aforesaid, on this present day of ; in the year of our Lord ; upon the oaths of , and by virtue of the statute, made and provided in cases of forcible entry and detainer, it is found, that A. O. late of ; yeoman, and B. O. late of ; yeoman, on the day of ; now last past, into a certain messuage, with the appurtenances, of A. I. of , aforesaid, in the county aforesaid, gentleman; situate, lying and being at , aforesaid, in the county aforesaid, with force and arms did enter, and him the said A. I. then with strong hand, did disseise and drive out, and him thereof, the said A. I. thus driven out from the aforesaid messuage, with the appurtenances, from the day of aforesaid, to this present day of the taking of the inquisition, with strong hand and armed force, did keep out, and do yet keep out, as by the inquisition aforesaid, more fully appeareth of record. We therefore charge and command you, that taking with you the power of the county, if it be needful, you go to the said

messuage and other the premises, and the same with the appurtenances, you cause to be reseised; and that you cause the said A. I. to be restored, and put into his full possession thereof, according as he, before the entry aforesaid, was seised, according to the form of the said statute. And this you shall in no wise omit, on the penalty thereon incumbent. We moreover command you, that of the goods and chattels of the said A. O. and B. O. you cause to be made the sum of , which to the said A. I. hath been adjudged for his treble costs in the said suit expended; and that for want of goods and chattels whereon to levy the same, you take the bodies of the said A. O. and B. O. and them safely keep in close custody, in the common gaol of the said county, until they shall pay the same, or be thence delivered by due course of law. Given under the hand and seal of the said J. P. at , in the said county, the day of , in the year of our Lord .

FORESTALLING, INGROSSING AND REGRATING.

FORESTALLING, properly means *to market before the public*, or to *prevent the public market*:

Ingrossing is from *in* and *gross*, great or whole:

And *regrating*, from *re*, again, and the French *gratter*, to grate or scrape; and signifieth the scraping or dressing of cloth or other goods, in order for selling the same again.

At the common law, all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have a tendency thereto, whether by spreading false rumours, or by buying things in the market before the accustomed

hour, or by buying and selling again the same thing in the same market; or by any other such like devices, are highly criminal, and punishable by fine and imprisonment.

By the common law, a merchant bringing victuals into the realm, may sell the same in gross; but no person can lawfully buy within the realm, any merchandize in gross, and sell the same in gross again, without being liable to be indicted for the same.

The bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the ingrosser or not.

So jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf; perhaps for this reason, because by such means the market is in effect forestalled.

FORFEITURE.

BY a judgment pronounced against an offender for high treason, he forfeits all his estate to the public.

By a judgment for misprision of treason, he forfeits the one half of his lands and tenements, goods and chattels.

All a man's goods and chattels which he has at the time of conviction, are by the common law forfeited upon conviction of petit treason and felonies of all sorts; whether within the benefit of clergy or not. Petit larceny and standing mute, also for flight on accusation of treason, felony or petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels.

A felon or traitor may, *bona fide*, sell any of his chattels for the sustenance of himself and family, between the fact and conviction: but if they be collusively, and not *bona fide* parted with, merely to defraud the state, the law will reach them; for they are all the while substantially the goods of the offender.

FORGERY.

TO *forge*, a metaphorical expression, borrowed from the occupation of the smith, means, properly speaking, no more than to *make* or *form*: but in our law it is always taken in an evil sense; and therefore *forgery* at common law denotes a *false making*; which includes every alteration of, or addition to, a true instrument: a making *malo animo*, (with an evil intent) of any written instrument for the purpose of fraud and deceit. This definition results from all the authorities ancient and modern, taken together.

The offence is punishable as a misdemeanor at common law.

Forgery may even be committed by a party's making a false deed in his own name; as if he make a subsequent deed of feoffment, as of a date prior to a former deed of his own, conveying the same lands, thereby attempting to give the last an operation, which in justice it ought not to have, in order to defraud his own feoffee.

Making a fraudulent insertion, alteration, or erasure, in any material part of a true instrument, although but in a letter; and even if it be afterwards executed by another person, he not knowing of the deceit; or the fraudulent application of a true signature to a false instrument, for which it was not intended; or *vice versa*; are as much forgeries as

if the whole instrument had been fabricated: for any such alteration gives it a new operation. As by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated.

So the wilful insertion of a legacy in another's will, unknown to him prior to, and at the time of its execution, is a forgery.

In all cases, however, it is to be observed, that where the forgery consists in counterfeiting any other known instrument, it is not necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive where ordinary and usual observation is given, it seems to be sufficient.

The making of any false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due.

It is equally clear, that forgery may be committed in the name of a supposed character who does not exist, but is assumed by the offender for the purpose of the fraud.—*East's Crown Law*, vol. II. p. 852—966.

The provisions which have been adopted in the statutes of this territory, for the punishment of forgery, will be found in the act for the punishment of crimes and misdemeanors, page 315.

GAMING.

THOUGH all common gaming houses are nuisances in the eye of the law, as being great temptations to idleness, and apt to draw together numbers of disorderly persons; yet gaming, itself when un-

accompanied by fraudulent practices, is not prohibited by the common law. So frequent, however, and so inseparable, almost from the extensive practice of gaming, are the abuses which generally accompany it; so favourable are the opportunities it affords to the artful and abandoned to impose upon the simple and unweary; so inveterate and destructive are the habits of idleness, of dissipation and greedy rapacity, which it commonly generates; so wasteful is the havoc it makes on the whole system of domestic œconomy; and so unjust is it that a husband or a father, should without any restraint, in the wild moments of frantic extravagance, be permitted to strip himself of that property, of which in the eye of reason, he is only a trustee; that the legislatures of civilized nations have thought fit either to prohibit the practice of gaming, or to encumber it with regulations which are calculated in some measure at least, to check its desolating ravages.

In the Mississippi territory, the provisions which our legislators have adopted on this subject, will be found in the act "to prevent the evil practice of gaming," to which it will be only necessary to refer.

GAOLER.

IN all cases where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass or other offence, every gaoler ought to keep such prisoner in safe and close custody; safe, that he cannot escape; and close, without conference with others, or intelligence of things abroad.

Therefore if the gaoler shall license his prisoner to go abroad for a time, and then to come again, or

to go abroad with a keeper; though he come again, yet these are escapes, for which the gaoler is punishable.

Hereupon it is lawful to hamper a felon with irons to prevent his escape.

If the gaoler keep the prisoner more strictly than he ought of right, in consequence of which the prisoner dieth; this is felony in the gaoler by the common law; and this is the cause, that if a prisoner die in gaol, the coroner ought to sit upon him: if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, it will be deemed wilful murder in the person guilty of such duress.

If the gaoler voluntarily suffer the prisoner to escape, he shall be punished in the same manner as the prisoner ought to have been who escaped: and if he negligently permit him to escape he shall be punished by fine and imprisonment. And the sheriff shall answer for him.

But the principal gaoler is only finable for the voluntary escape of a felon, suffered by his deputy; for no one shall suffer capitally for any crime but he who is actually guilty of it.

But for a negligent escape suffered by his bailiff, the sheriff is as much liable to answer as if he had actually suffered it himself; and the court may charge either the sheriff or the bailiff for it. If a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him.

The regulations which have been made by statute, relating to gaols and gaolers, will be found in the act for the well regulating of gaols, and in the act for the punishment of crimes and misdemeanors, p. 320, of the statutes.

HAWKER AND PEDLAR.

WERE there any well known legal adjudications, fixing the meaning of this term at common law, it would not probably be altogether regular to have recourse to a mere general dictionary of the English language in order to determine the sense in which it has been employed in the statutes of our territory. But as this is not the case it will not be improper to apply to the authority of Dr. Johnson. A hawker, says he, from the German word *hock*, is one who sells his wares by proclaiming them in the street. A pedlar, a contraction from *petty dealer*, is one who travels the country with small commodities. It is in this sense that the term seems to be used in the English statute of the 9 and 10. William, Ch. 27; which enacts, "that there shall be paid by every hawker, pedlar, petty chapman, or any other trading person, going from town to town, or to other men's houses, and travelling either on foot or with horse, horses or otherwise, within the kingdom of England; carrying to sell or exposing to sale, any goods, wares, or merchandizes, a duty of £.4 for each."

These observations are made for the purpose of illustrating the meaning of the act of the territorial legislature; which renders it necessary for hawkers and pedlars to take out a license; as that act is by no means explicit with regard to the particular description of traders, who were meant to be included under this denomination.

Under the article on *convictions* it has been seen that the court of king's bench in England, decided that a single act of selling a parcel of handkerchiefs to a particular person, is not a proof that the trader was such a hawker or pedlar as ought to take out a license. In the case of Hunter and Couthard, it seemed to be admitted that Hunter was not a haw-

ker and pedlar; although he had been convicted as such by the mayor of Carlisle. Hunter kept a shop at Dumfries, and sold all sorts of linen and woolen drapery there. Once a year, for several years together, he came to Carlisle, and brought to a public house there large quantities of the like goods; and published through the city, that the goods would be there sold; which goods he continued selling by retail for a week or ten days, as customers came in; and then returned to Dumfries. The mayor convicted him as a hawker and pedlar for selling goods without a license. Hunter brought an information against the mayor; and there appeared to be no doubt entertained but that the conviction was wrong.

HOMICIDE.

HOMICIDE is the killing of an human being born into the world; either accidentally, justifiably, excusably, or feloniously.

According to these several qualifications of the fact, it will become either

I. Homicide by misadventure;

II. Homicide founded 1. On public justice; 2. On personal just necessity;

III. Homicide by chancemedley; 1. Voluntary striking, but by passion; 2. Involuntary, but not without blame in act or neglect;

IV. Homicide criminal; 1. Manslaughter; 2. Murder of malice forethought.

I. *Of homicide by misadventure.*

This is when one doing a lawful act, without intention of bodily harm to any person, and using proper caution to prevent damage, happens unfortunately to kill.

An instance of this, which exactly coincides with, and clearly illustrates, all the points of the definition, is given in the Mosaic law.

"When a man goeth into the wood with his "neighbour to hew wood, and his hand fetcheth a "stroke with the axe to cut down the tree, and the "head slippeth from the helve, and lighteth upon "his neighbour that he die."

Death happening in the exercise of an *innocent* and *allowable* recreation, without neglect of reasonable and usual precautions, falls within the description of homicide by misadventure.

If a man, without request of the rider, whip the horse of another man, whereby he rides over a child and kills it, this is accidental homicide *in the rider*.

If a parent, in correcting his child, a master his servant under age, an officer a criminal, give an unhappy stroke, which causes death, no malice appearing from the instrument, the manner or the motive of the correction, this too is homicide, accidental by misadventure. But the circumstances thus exculpating the party must all clearly appear in evidence; otherwise it will be manslaughter if not murder.

II. *Of homicide founded on justice.*

Homicide, in the former instance, was considered as not culpable, because owing to such accidents as human foresight is not presumed adequate to prevent; we are now to instance a species of homicide in obedience to the severe necessity of public justice. This is justifiable when in strict pursuance of legal authority. This divides itself into several branches:

1. *In civil cases where resistance is made;*
2. *In cases of felony, where resistance is made;*
3. *In cases of felony, where the felon fleeth, and cannot be apprehended.*

1. *Of resistance in civil cases.*

In civil cases the rule appears to have its necessary limitations; for as not every assault will justify every battery; so, notwithstanding the officers of justice are in the necessary discharge of their duty protected, not every slight resistance would justify killing a party who should oppose the execution of civil process. But certainly in case of resistance made, the person having authority to arrest may repel force with force, and need not give back: and if death unavoidably ensue in the struggle, he will be justified; as on the other hand, the killing the officer will be murder.

2. *Of resistance in criminal cases.*

Resistance in criminal cases, especially of felony, exempts the person whose duty it is to apprehend, from any degree of legal imputation, if he kill instantly him who resists.

3. *Of flight in case of felony.*

Presumptively, he confesses the crime who flies from the legal investigation of a charge against him.

But if a person fleeth in a case of misdemeanor, this will not justify the taking of his life to prevent an escape. But, as in case of felony, so here, if the officer meet with resistance and kill the offender in the struggle, he will be justified; and if the officer be killed, it will be murder.

The application of the rule, that it is lawful to kill a fugitive felon, most usually happens in case of a burglary or highway robbery, or murder; and in these instances it is obviously the duty of every man to endeavour to prevent an escape; the officer on warrant, describing the person, and any private individual, on view of the offence at the instant of its being committed; and if the fugitive cannot be

overtaken, the killing of him will be justifiable homicide.

There is another great head of justifiable homicide, founded on public justice; which is *where one killeth another as executioner* pursuant to the sentence of a court having competent jurisdiction; but then it must be pursuant; for a change of the mode of putting to death will change the quality of the act, and is even said to be murder: which however must be understood with limitations.

As to homicide *founded on personal just necessity*; a woman to defend herself from violation, may justifiably kill the assailant.

If a man attempt to break into the house of another by night, with intent to rob or murder him; or if he stop another on the highway, and endeavour to rob him, the party attacked, or any other seeing the attack made, may justifiably kill the felon.

Of homicide se defendo, excusable.

This is to be understood in the case where the killing is eventually become necessary for self defence; but the cause which rendereth that defence necessary, is not altogether without blame on the part of the killer.

Such is the case of self defence upon chancemedley, (possibly, *chaud melle*,) when in a sudden affray one killeth another.

This bordereth very nearly upon manslaughter; and to place it on the foot of mere excusable self-defence; it ought to appear in evidence, that the party killing retreated as far as he could with safety; and then, urged by instant necessity, killed the other for the preservation of his own life.

Of manslaughter.

From such facts attending the death of another as are either inevitable, or strictly authorised, or the consequence of excusable infirmity on the part of

the killer, we now come to evidence of such killing as the law deemeth criminal, though not without such indulgence to human frailty as exempts from the necessity of capital punishment.

Words of reproach, or provoking actions or gestures, expressive of contempt or reproach, without an assault upon the person, will not so far excuse the use of a deadly weapon as to render the fatal consequences manslaughter and not murder; but a fatal stroke with the unarmed hand, or with a stick not likely to kill would be a manslaughter in such a case.

Evidence of an intent to kill, or to do some great bodily harm, the probable consequences of which might be death, place homicide under the denomination of murder.

After reciprocal words of provocation, if an immediate combat ensue, and one kill the other, our writers in general on the crown law agree this is but manslaughter, if no unfair advantage be taken; and that in such conflicts it mattereth not whether the person killed, or his antagonist gave the first blow.

Any degree of premeditation, any interval in which the gust of passion subsides, will take away in such case, the excuse allowed to human infirmity, and the killing will then be murder: for which reason in manslaughter, there can be no accessaries before the fact; because if not unpremeditated, it is not manslaughter, but murder.

DUELS.

It is manifest that this consideration affects the case of duelling; and that the very sending a challenge, or retaining seconds, is decisive evidence of that deliberate purpose which constitutes *homicide prepense*.

A killing consequent on a trespass will be manslaughter, when it would be otherwise homicide by misadventure.

Of homicide on malice prepense, or murder.

The idea of this crime may be formed by negative induction from the proceeding particulars: for if it be neither homicide founded on public justice, nor in necessary or excusable self-defence, nor in passion, nor in accident, it remains that it is murder.

However, it is proper to shew by cases, evidence of facts characterising this offence.

We have seen that moderate correction is excused under the head of misadventure: but correction unrelentingly continued, though the strength is manifestly sinking under it; correction with instruments not adapted to just and reasonable chastisement, but likely to produce death, will be murder.

Where one man killeth another without provocation, the law judgeth it of malice *prepense*: and in the Lord Morley's case it was resolved by all the judges, that words are no provocation to lessen the offence from being murder, if one man kill another upon ill words given to him.

Original assault on a person who hath not then drawn.

If B. draweth his sword, and maketh a pass at A. whose sword is at that time undrawn, and then A. draw, and a combat ensue, and A. be slain, this is murder in B. for B. by making his pass, his adversary's sword undrawn, shewed that he sought his blood: and A's defending himself, which he had a right to do, will not excuse B.

Assault sought as a colour for homicide.

Much more when a provocation is sought with an intent to kill, under colour of self-defence or of sudden resentment, such killing is murder; for the

pretence is the strongest proof of the deliberate malignity of the purpose.

Death of one person occasioned by mischief intended against another.

There is a species of homicide, which in a vague sense may be said to be misadventure, but which in criminal jurisprudence is referred to a very different denomination: when, for instance, a man meaning to kill A. in attempting to execute that murderous intent, misses A. and kills B. who is standing near A. This on the clearest principles, is evidently murder; for the malice hath only glanced beside the person who was its object: but a mischief of the same kind, and equal in degree, hath been actually produced. And wherever the death of the party intended to have been slain would have been murder, it will amount to the same offence, if the stroke or poison take place against another.

Of the killing of officers in the execution of their office.

The killing of officers employed as ministers of public justice, or of private persons exerting themselves for the restitution of order and security, is murder.

The officer is understood to be under this protection of the law, not only while in the actual execution of his office, but in those circumstances which necessarily precede or are subsequent, as in going or returning.

The protection extendeth to every man, whether required or not, aiding the officer in the discharge of his duty.

In the case of a fresh pursuit, and yet more of an hue and cry, all who join in aid of the pursuers are under this legal protection.

The ministers of justice in civil suits are in the same manner protected within the extent of their authority.

Killing with implied malice.

The malice implied by law is a felonious intent: not a design merely conceived from hatred towards a particular person.

Thus where one goes forth with an avowed intention of killing the first man he meets, and meeting one whom before he had never seen, kills him, there is no need of proof of particular malice.

So where one gives poison knowingly to another, the poisoning itself implies that deliberation which includes malice.

Or where one kills another, though in mutual combat, in pursuance of a deliberate intent to kill.

Of this deliberation it has been held to be sufficient proof, where on a quarrel, the one said to the other, *if we fight at this time, I shall have the advantage from my high-heeled shoes:* and presently after they went out and fought.

And on the same principle, appointing the place, has been held proof of that malice, which in law implies a murderous intent.

Where the killing has been in consequence of insulting gestures, this implies malice; for the law regards not such looks and behaviour as a provocation.

When a gaoler kills a prisoner by duresse, the law implies malice from the manner of the death.

Causing the death of another by withholding the nourishment necessary to support life, is murder: and of murder thus perpetrated against their child, a man and his wife were convicted before Mr. Justice Ashurst, at the Bury Assizes.

Wilfully turning loose a wild beast out of wantoness amongst a croud, is murder, if one be killed;

because of the apparent probability that such consequences would happen: and a man in doing an unlawful act is presumed to intend its natural consequences.

Killing of an officer known to be such; or person interfering to take the peace, and manifesting such his intent.

If an officer of justice, having a warrant from a competent jurisdiction, not defective in form, be resisted and slain, or any other person be slain who cometh to his aid, this is murder, as we have seen already; for the law inferreth malice from the voluntary resistance to its known authority.

But it is necessary there should be notice, either express or implied: of such officer within his district, it hath been deemed that the law presumeth notice: and such are therefore called *known* and *sworn bailiffs* or constables.

In the day, within the district, the staff, or in the night commanding peace in the name of the commonwealth; or otherwise expressing his authority and intent, will be sufficient; for though the staff will not make a constable, yet within his jurisdiction it is a competent intimation of his legal interferance. And after such notice, it will be murder to kill any person interfering to prevent an actual breach of the peace.

HOUSE.

A MAN'S home or habitation is so far protected by the law, that if any person attempts to break open a house in the night time, and shall be killed in such attempt, the slayer shall be acquitted and discharged. So tender is the law in respect of the immunity of a man's house, that it will never suffer it to be violated with impunity. Hence in part

arises the animadversion of the law upon eavesdroppers, nuisances, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully, without danger of raising a riot, rout, or unlawful assembly, in order to protect or defend his house, which he is not permitted to do in any other case.

In the case of burglary, which is breaking and entering a dwelling-house in the night time with intent to commit felony, it is a capital offence, although, no offence be actually committed.

Concerning the breaking open the doors of an house, in order to apprehend offenders, it is to be observed, that the law never allows of such extremities, but in cases of necessity; and therefore that no one can justify the breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. But more will be found on this subject under the article *arrest*.

HUE AND CRY.

HUE and cry properly signifies a pursuit of robbers by blowing a horn, and by making an outcry.

This blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very antime; for among the laws of Wihtred king of Kent, in the year 696, this is one; that "if a stranger go out of the road and neither shout nor blow a horn, he shall be taken for a thief."

Hue and cry is the old common law process after felons, and such as have dangerously wounded any person; and this hath received great countenance and authority by several acts of parliament.

When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night; the party grieved or any other may resort to the constable of the ville; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night: for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found.

For levying hue and cry, although it is a good course to have the warrant of the justice of the peace, when time will permit, in order to prevent causeless hue and cry; it is by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained, and hue and cry was part of the law before justices of the peace were first instituted.

The duty of the constable is to raise the power of the town, as well in the night as in the day, for the prosecution of the offender.

Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the consta-

ble may search suspected places within his ville, for the apprehending of the felons.

But though he may search suspected places or houses, yet his entry must be by the doors being open: for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore in case of such a search the breaking open the door is at his peril, namely, justifiable, if he be there: not justifiable if he be not there. But it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken.

If the person against whom the hue and cry is raised, be not found in the constablewick, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the territorial boundaries.

And the officers of the precinct where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other precinct round about him, and not to one next precinct only. In such cases it is needful to give notice in writing, to the pursuers, of the things stolen, and of the colour and marks thereof; as also to describe the person of the felon, his apparel, horse, and the like; and which way he is gone, if it may be.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described.

Therefore in this case, all that can be done is,

for those that pursue the hue and cry, to take such persons as they have probable cause to suspect: as for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like.

The life of hue and cry, says Lord Coke, is fresh suit.

If the person pursued by hue and cry, be in a house, and the doors are shut, and refused to be opened on demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only a suspicion of felony; for it is for the commonwealth.

It seems in this case, that if he cannot be otherwise taken, he may be killed; and the necessity excuseth the constable.

If hue and cry be raised against a person certain for felony, though possibly he is innocent; yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common gaol, to carry him to a justice of the peace, to be examined where he was at the time of the felony committed, and the like.

If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, and the like; yet the hue and cry doth justify the constable or other person following it, in apprehendiug the person so described, whether innocent or guilty: for that is his warrant; it is a kind of process that the law allows, not usual in other cases, namely, to arrest a person by description.

In case of hue and cry once raised and levied, on supposal of a felony committed, though in truth there was no felony committed, yet those that pursue hue and cry, may arrest and proceed, as if so be a felony had been really committed.

Therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon hue and cry levied do extremely differ; for in the former case there must be a felony averred to be done, and it is issueable; but in the latter, to wit, upon hue and cry it need not be averred; but the hue and cry levied upon information of a felony is sufficient, though perchance the information were false.

The reasons hereof are these: 1. Because the constable cannot examine the truth or falsehood of the suggestion of him that first levied it, for he cannot administer to him an oath: and if he should forbear his pursuit of the hue and cry till it be examined by a justice of the peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because he that first raiseth a hue and cry, where no felony is committed; that is, he who giveth the false information, is severely punishable by fine and imprisonment, if the information be false.

Warrant to levy hue and cry on a robbery having been committed,

Washington. The Mississippi Territory of the United States, to all constables and other officers, as well in the said county of Washington, as elsewhere, to whom the execution hereof doth or shall belong.

WHEREAS A. I. of , in the county of , yeoman, hath this day made information upon oath, before J. P. esquire, one of the justices of the peace in and for the said county of W. that in this present , day of , in year of our lord ; between the hours of three and four in the afternoon of the ssme day, at a place called , in the said county of W. in the public highway there, two malefactors and felons, to him the said

A. I. unknown, in and upon him the said A. I. then and there feloniously did make an assault and him the said A. I. then and there feloniously did put in great fear and danger of his life: and the sum of , of lawful money of the United States of America, of the goods and chattels of him the said A. I. from the person, and against the will of him the said A. I. then and there violently and feloniously did steal, take and carry away; and that one of the said malefactors and felons, to him the said A. I. unknown, is a tall, strong man, and seemeth to be about the age of years: is pitted in the face with the small-pox, and hath the scar of a wound under his left eye, and had then on a dark brown riding-coat, &c. and did ride upon a bay gelding, with a star on his forehead: and the other, &c. And that after the said felony and robbery committed, they the said malefactors and felons, to him the said A. I. unknown, did fly and withdraw themselves to places unknown, and are not yet apprehended.—These are therefore to command you forthwith, to raise the power of the county within your several districts or precincts, and to make diligent search therein, for the persons above described, and to make fresh pursuit and hue and cry after them from district to district, and from county to county, as well by horsemen as by footmen; and to give due notice thereof in writing; describing in such notice the persons and the offence aforesaid, unto every next constable on every side, until they shall come to the territorial boundaries, or until the said malefactors and felons shall be apprehended; and all persons whom you or any of you shall, as well upon such search and pursuit, as otherwise, apprehend or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith before some

one of the justices of the peace in and for the county where he or they shall be so apprehended, to be by such justice examined, and dealt with according to law. And hereof fail you not respectively, upon the peril that shall ensue thereon.—Given under the hand and seal of the said J. P. at , in the said county of W. the day of aforesaid, in the year aforesaid.

HUNDRED.

IN ancient times it was ordained for the more sure keeping of the peace, that all free born men in England should cast themselves into several companies, by ten in each company: and that every of those ten men should be surety and pledge for the forthcoming of his fellows. For which cause, these companies in some places were called tythings, as containing the number of ten men with their families. And as ten times ten make an hundred, so because it was then also appointed, that ten of these companies should at certain times meet together for their matters of greater weight, therefore that general assembly was and yet is called an hundred.

If any homicide were committed, or dangerous wound given, in the day time, and the offender escaped, the town was amerced; and if out of the town, the hundred was amerced.

The hundred was obliged to make good the damages in cases of robbery; cutting banks; cutting hop-binds; burning houses, barns, out-houses, hovels, cocks, mows, or stacks of corn, straw, hay or wood; mines, or pits of coal; destroying granaries, or corn intended for exportation: de-

stroying turnpikes; or works of navigable rivers, and the like.

JEOPARDY.

IT is a maxim of the common law, that no man shall be put in jeopardy, that is, that no man shall be brought into danger of his life or limb, for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found *not guilty* on an indictment free from error, and well commenced before any court which hath jurisdiction of the cause, he may by the common law in all cases whatsoever, plead such acquittal in bar of any subsequent indictment for the same crime—*Hawkins' Pleas of the Crown, vol. 2. p.* 524.

But a discharge by a justice of the peace, or the not finding of a true bill by a grand-jury, is no bar to a subsequent prosecution; for the party's life never was in jeopardy. Neither of them could pronounce definitively.

I take it, says Mr. Hawkins, to be settled at this day, that wherever the indictment, whereon a man is acquitted, is so far erroneous, either for want of substance in setting out the crime, or of authority in the judge before whom it was taken, that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment, because in judgment of law the defendant was never in danger of his life from the first: for the law will presume *prima facie*, that the judges would not have given a judgment, which would have been liable to have been reversed. But if there be no error in the in-

dictment, but only in the process, it seems agreed that the acquittal will be a good bar of a subsequent prosecution, notwithstanding such error; the best reason whereof seems to be this, that such error is salved by the appearance—2 *Hawk.* 528.

It seems to be settled at this day, that an acquittal of a man as principal is no bar of a subsequent prosecution against him as accessary after the fact; because such acquittal clears him only of the charge of having committed the fact; which being a crime entirely different from that of receiving him that hath committed it, there seems no more reason that the acquittal of it should bar a prosecution for the receipt, than if they were offences that bore no manner of relation to one another—2 *Hawk. p.* 529.

Notwithstanding the connection between principals and accessaries, yet in consideration of law, their offences are quite different. And for that reason, I presume it is, says Judge Foster, that if A. be indicted as principal, and B. as accessary, and both are acquitted, yet B, may be indicted as principal in the same offence, and his former acquittal is no bar. On the other hand it seemeth to be agreed, upon what grounds I know not, that if A. be indicted as principal and acquitted, he cannot afterwards be indicted as accessary before the fact: "For" say some, "it is in substance the same offence." Others "if a man inciteth to the offence he is *quodam modo*, guilty of the fact."

In foro cœli this is true. In the sight of God, Ahab was the actual murderer of Naboth. "Hast "thou," saith God to him by the prophet, "killed "and also taken possession? In the place where "dogs licked the blood of Naboth, shall dogs "lick thy blood, even thine?" And in the case of Uriah, God, by another prophet, saith to David, "thou hast killed Uriah the Hittite with the sword,

"and slain him with the sword of the children of "Ammon."

But is it also true, *in foro sœculi*? By no means. For in the eye of the law the offences of principal and accessary, specifically differ, and fall under a quite different consideration. The point in the case reported by Kelyng which was of an accessary after the fact, was at length settled upon sound principles of law and reason. But the reasoning upon that case, founded on a distinction between what preceded, or was subsequent to the fact, is, I confess, says Judge Foster, too refined for my comprehension: and probably will continue so, till I can remove ancient land-marks, and forget the legal distinction between principals and accessaries, and every principle of law founded on it. For if the offences of the principal and accessary do, in consideration of law, specifically differ: and if a person indicted as principal, cannot be convicted upon evidence, tending barely to prove him to have been an accessary before the fact, which I think must be admitted, I do not see how an acquittal upon one indictment could be a bar to a second for an offence specifically different from it.—In the case I first stated it was no bar, why therefore in the second?

This I offer as a doubt of my own, which is submitted to the opinion of the learned—*Foster's Discoveries.*

JEOFAILS.

JEOFAILS are statutes made for curing or overlooking mistakes in pleadings; and they are called statutes of jeofail; because when a pleader observes any slip in the form of his proceedings, and acknowledges such error, *jeo fail*, or I have failed, he is at liberty by these statutes to amend it; which amendment is seldom actually made; but the benefit of the acts is attained by the courts overlooking the exception.

INDICTMENT.

INDICTMENT cometh of the French word *enditer*, and signifieth in law, an accusation, found by an inquest of twelve or more upon their oath.

There can be no doubt, but that all capital crimes whatsoever, and also all kind of inferior crimes of a public nature, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted: but no injuries of a private nature, unless they some way concern the state or the public at large.

Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of the citizens; or commands a matter of public convenience, as the repairing of the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it.

But if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concerns disputes of a private nature, as those relating to distresses made by lords on their tenants; it is said that offences against such statutes will hardly bear an indictment.

Also where a statute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it seemeth to be settled at this day, that it will not maintain an indictment.

But lord Hale distinguishes upon this, and says, that if a statute prohibit any act to be done, and by a substantive clause gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment: the party may be indicted upon the prohibitory clause, and thereupon fined, but not to recover the penalty; but then it seems the fine ought not to exceed the penalty: but if the act be not prohibitory, but only that if any person shall do such a thing, he shall forfeit so much, to be recovered by action of debt, bill, plaint or information; then he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information.

Also, where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt, but that the offender may be still indicted, if the prosecutor thinks fit, at the common law. If the indictment for such offence conclude *against the form of the statute*, and cannot be made good as an indictment upon the statute, it seems to be now settled, that it may be maintained as an indictment at common law.

An indictment may be found upon the oath of one witness only, unless it be for high treason, which requires two witnesses.

Where there are two counts in the indictment, as one for a riot, another for an assault; the same

may be considered as two distinct indictments; and the jury may affirm the bill as to one of the counts, and reject it as to the other.

So where the indictment charges that A. O. burglariously entered the dwelling house of A. I. and feloniously stole therefrom one silver spoon, the party may be acquitted of the burglary and convicted of the larceny. So in indictments for robbery and all complicated larcenies; the prisoner may be acquitted of the circumstances of aggravation namely, the fear or violence, and found guilty of the simple larceny.

INFANTS.

AN infant is one who is under the age of twenty one years.

The law does in some cases privilege such an one as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission; for not having the command of his fortune, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like: which infants when full grown are at least as liable as others to commit; for these an infant above the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one.

Under seven years, an infant cannot be guilty of felony: but at eight years old he may, if capable of guile. Under fourteen he shall be deemed incapable of guile, until it appear that he was capable, and could discern between good and evil; and and then he may be convicted, and suffer death. As if after killing his companion, he hide himself

or the body; or as if in the case of burning a house it appears he had malice, revenge and cunning. But in all such cases, the evidence of malice, which is to supply age, or of a capacity to discern between good and evil, should be strong and clear beyond all doubt or contradiction.

With regard to civil cases; an infant cannot be sued without joining the name of his guardian; but he may sue by his guardian, or next friend who is not his guardian; and may by any person who will undertake his cause, and is sometimes made use of in suits against a guardian. Generally speaking he cannot alien his lands, nor do any legal act, nor make a deed or writing under seal; nor indeed any manner of contract that will bind him; but this is subject to some exceptions; for he may purchase lands, but the purchase is incomplete: for when he comes of age he may either agree or disagree thereto, as he thinks prudent or proper, without alledging any reason: and so may his heirs after him, if he dies without having completed his agreement. He may by deed or will appoint a guardian to his children, if he has any. Also he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards; but if he bind himself in a bond with a penalty, for the payment of any of these necessaries, that bond shall not bind him. If he borrows money to pay for necessaries, and applies it accordingly, he is not liable at law, because he may have wasted it. If he is an executor, he may give an acquittance on payment, not without payment. No laches, or lach of diligence, or negligence, can be imputed to him during his infancy.

At fourteen he may make a will of personal estate if of discretion: and may contract marriage; at seventeen he may act as executor.

Where the defendant in an action against him for goods furnished to him *for carrying on his trade*, gave his non-age in evidence, Mr. Baron Clarke directed the jury to give a verdict for the plaintiff, it appearing he had been set up in his farm and bought the sheep of the plaintiff in the way of farming, and said he thought the law ought not to put it in the power of infants to impose upon the rest of the world. *(Loft's Gil.* 371.*)* But Lee would not suffer the plaintiff to recover in a similar case because trade may be the undoing of an infant.

INFORMATION.

AN information is used in certain cases instead of an indictment, and it takes its name from the form thereof: "A. B. comes into court, &c. and gives the court to understand and be informed, that &c."

It is every day's practice in the English courts to proceed by way of information, either in the name of the attorney general, or of the master of the crown office, for offences done principally to private persons, as for batteries, cheats, rescuing persons from legal arrests, perjuries and subornation thereof; forgeries, conspiracies, and the like: as well as for offences done principally to the government, and those who exercise it: as for libels, seditious words, riots, extortions, disobeying judicial writs, abusing a public commission to the oppression of the citizen: and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty.

Informations partly at the suit of the government and partly at the suit of party, are commonly

called informations *qui tam*, from those words in the information when the proceedings were in Latin: *qui tam pro domino rege quam proseipso, &c.**

Of near affinity to an information *qui tam*, is an action upon the statute; which is either a private action, which is when an action is given upon a statute to the government, and to the party grieved only: or a popular action, which is where the action is given to the people in general, that is, to any one that will sue for the government, and for himself.

JUDGMENT.

OF judgments, some are fixed and stated; as in cases of treason and felony.

Others are discretionary and variable, according to the different circumstances of each case. Thus for crimes of an infamous nature, such as petit larceny, perjury, or forgery at common law, gross cheats, conspiracy, not requiring a villainous judgment, keeping a bawdy-house, bribing witnesses to stifle their evidence, and other offences of the like nature: it seems to be in a great measure left to the prudence of the court to inflict such corporal punishment, and also such fine, and binding to the good behaviour for a certain time, as shall seem most proper and adequate to the offence.

The court may assess a fine, but cannot award any corporeal punishment against a defendant, unless he be actually present in the court.

Where there are several defendants, a joint award of one fine against them all, is erroneous: for it ought to be several against each defendant; for otherwise, one who has paid his proportionable

* *Who as well* for the lord the king as for himself, &c.

part, might be continued in prison till all the others have also paid theirs; which would be in effect to punish him for the offence of another.

A fine is under the power of the court, during the term in which it is set; and may be mitigated as shall be thought proper; but after the term it admits of no alteration.

A judgment contrary to the verdict is void.

By many statutes peculiar punishments are appointed for several offences, as pillory, stocks, imprisonment, and the like: and in all these cases, no room is left for the justice's discretion: for they ought to give judgment, and to inflict the punishment in all the circumstances thereof, as such statutes direct.

JURIES.

THE mode of trial by jury has existed from time immemorial: and in England notwithstanding all the revolutions of its government, it has continued substantially unaltered and unimpaired to the present day. The democratical part of the legislative branch of the English government has silently suffered a gradual, but almost radical change with the lapse of ages; but the democracy of its judiciary has happily retained the purity and vigour of the early, youthful days of the English constitution. And it is to this, together with the character and independence of her judges, more than to any excellence in the formation of her legislative and executive departments, that Great Britain owes her political superiority over other Europen countries.

That the first settlers of the western continent should bring with them the favourite institution of

the parent state, was no more than natural; and so strong has been their attachment to the trial by jury, that the perpetuity of this mode of trial has been guaranteed by the constitutions of several of the American commonwealths. The fundamental principle of this institution is, that a man should be tried by his peers or equals, a commoner by commoners and a nobleman by nobles; and so liberal was the extension of this principle even in the 14th century, that by the 28th of Edward III, ch. 13, it was provided, that in inquests to be taken between aliens and English subjects, one half of the jury should consist of aliens, and the other half of English subjects. We have a similar provision in our own statutes, page 174.

But after all, the practical excellence of a trial by jury depends on the character and integrity of the jurors.

If jurors disregard the law, if they shut their eyes on the evidence; if they be carried away by personal, or political, or neighbourhood, or national feeling and prejudices; the cause of justice is as safe in the hands of a Turkish bashaw as of an American jury. Let jurors therefore be emulous to maintain the dignity of their station, and always remember that the baseness of being carried away by the influence of interest or of passion, is no less when twelve men are guilty of it, than if the guilt lay on the conscience of one only.

I shall proceed with a few observations on the *right of challenge*.

Challenges are of two sorts; *challenges* to the *array* and challenges to the *polls*.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under officer who

arrayed the panel. And, generally speaking, the same reasons, that before awarding the *venire*, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer, of whose partiality there is any tolerable grounds of suspicion.—Though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this is good cause of challenge to the array.

Challenges to the polls, are exceptions to particular jurors, and seem to answer the *recusatio judicis* in the civil and canon laws: by the constitutions of which a judge might be refused upon any suspicions of partiality.

So likewise jurors may be challenged *propter affectum*, for suspicion or partiality. This may be either a *principal* challenge, or *to the favor*. A principal challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party: that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which if true, cannot be overruled; for jurors must be clear of all exception. Challenges to *the favor* are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like: the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The triors in

case the first man called, be challenged, are two indifferent persons named by the court: and if they try one man and find him indifferent, he shall be sworn: and then he and the two triors shall try the next; and when another is found indifferent and sworn; the two triors shall be superceded; and the two first sworn on the jury shall try the rest.

Challenges, *propter delictum*, are for some crime or misdemeanor that affects the juror's credit, and renders him infamous. As for a conviction of treason, felony, perjury or conspiracy: or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or hath been attainted of false verdict, or forgery. A juror may himself be examined on an oath of *voir dire*, *veritatem dicere*, (a general oath to speak the truth) with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.

What has been said has been with reference to civil cases; but in criminal cases also challenges may be made, either on the part of the prosecution, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes.

Such challenges are stiled challenges *for cause*; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is allowed to the prisoner an arbitary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a peremptory challenge.

It is also agreed, that by the common law, the public prosecutor may challenge peremptorily, as many as he thinks fit, of any jury returned to try any cause, in which the commonwealth is a party;

and certainly nothing can be more reasonable than that the same security should be reserved by the public, to obtain an impartial jury, as is given by them to the party accused. The right of peremtory challenge is conceded to a prisoner, not for the sake of multiplying his chances of escaping the punishment due to his crimes, but for the purpose of excluding from the number of his judges those whom he may have even private grounds for believing to be unreasonably biased against him: and surely if the agent of the public has similar suspicions that any individual summoned as a juror, has dangerous prepossessions in favour of a prisoner, or has been purposely set in the way of the sheriff in order to force himself among the arbiters of his fate, the cause of justice demands, even though he should not absolutely be able to substantiate his suspicions, that he should have the right of rejecting him as an unfit person to pass between the accused and his country.

The object of our numerous cautionary rules in criminal proceedings, is not to save villains from the gallows, but to secure the execution of fair and impartial justice. But this object never can be answered, unless the same rules as are used on the part of the prisoner, are applied on the part of the commonwealth, when from the nature of the case they are equally applicable.

It is to be observed, that no challenge can be taken, either to the array or to the polls, till a full jury have appeared; and that no juror can be challenged either by the government or prisoner, without consent, after he hath been sworn, whether on the same day, or on a former, on the same trial, unless it be for some cause which happened since he was sworn.

What we have hitherto said relates to the petit jury. As to the grand jury it is only to be ob-

served that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on the grand jury: as being outlawed for felony, &c. or villains, or returned at the instance of the prosecutor, or not returned by the proper officer, &c.

Of the demeanor of jurors in giving their verdict.

By the common law, a jury after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, and without speech with any, unless it be the bailiff, and with him only if they be agreed.

The bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.

If the jury after their evidence given to them at the bar, do at their own charges, eat or drink, either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if before they be agreed on their verdict, they eat and drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant it shall not avoid it: and so on the contrary. But if after they be agreed on their verdict, they eat and drink at the charge of him for whom they do pass, it shall not avoid the verdict.

But with the assent of the justices, they may both eat and drink; as if any of the jurors fall sick before they be agreed of their verdict, then by the assent of the justices, he may have meat or drink; and also such other things as be necessary for him and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so agree; and if they cannot agree, the justices may in such case, suffer the jury to have both meat and drink for a time, to see whether they will agree.

After their departure they may desire to hear one of the witnesses again; and it shall be granted so he deliver his testimony in open court: and also they may desire to propound questions to the court for their satisfaction, and it shall be granted, so it be in open court.

But if the plaintiff, after evidence given, and the jury departed from the bar, or any for him, deliver any letter from the plaintiff to any of the jury concerning the matter in issue which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant: and so on the contrary. But if the jury carry away any writing unsealed, which was given in open court, this shall not avoid their verdict; albeit they should not have carried it with them.

A jury charged and sworn in a capital case, cannot be discharged without the prisoner's consent, till they have given a verdict.

If a jury say they are agreed, and it being asked who shall say for them, they say their foreman; but upon farther enquiry they are not agreed they may be fined.

If a jury cast lots for their verdict, it shall be set aside, and they shall be fined for the contempt.

The jury it is said may give a verdict without testimony, when they themselves have conusance of the fact.

But if they give a verdict on their own knowledge they ought to tell the court so; that they may be sworn as witnesses; and the fair way is to tell the court before they are sworn as jurors, that they have evidence to give.

For certainly it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on

private information given by any juryman to the rest, where he cannot be cross examined.

After they be agreed, they may in causes between party and party, if the court be risen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning in open court, they may either affirm or alter their private verdict: and that which is given in court shall stand.

But in criminal cases of life or member, the jury can give no private verdict, but they must give it openly in court.

In all causes, and in all actions, the jury may give either a general or a special verdict, as well in causes criminal as civil; and the court ought to receive a special verdict, if pertinent to the point in issue.

Thus if one be indicted for grand larceny at common law, that is, for stealing goods above the value of 12d, yet the jury may find specially, that he is guilty, but that the goods are not above the value of 12d. In which case he shall only have judgment of petit larceny.

Jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact.

But if they will take upon them the knowledge of the law upon the matter they may: because the determining of the law is incidental to the right of finding a general verdict. A general verdict includes of course both law and fact.

It must be safer however, for a jury to follow the opinion of a judicious and impartial court, as to what is the law, than that of the most eloquent attorney, who in faet cannot be regarded in any other light than as the representative of a party in the cause.

But to find the special matter is the most prudent course, where the case is doubtful.

But if the jury find according to the direction of the judge in matter of law, although the judge be mistaken, yet the jury shall not be liable to attaint.

It hath been adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and reconsider the matter: but this by many is thought hard, and seems not of late years to have been so frequently practised as formerly. However it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal; as it seems that they may a verdict that convicts him, for having been given contrary to evidence, and the directions of the judge, or any verdict whatsoever for a mistrial.

After the verdict is recorded, the jury cannot vary from it: but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand.

A verdict finding an impossible matter shall not be void, if at the same time it find the substance of the indictment: but the surplus shall be rejected.

A verdict shall not be taken so strictly as pleadings; but the substance of the thing in issue ought always to be found.

It is said, that if the jurors agree not before the departure of the justices of gaol delivery into another county, the sheriff must send them along in carts: and the judge may take and record their verdict in a foreign county.

But if the case so happen that the jury can in no wise agree, as if one of the jurors knoweth in his own concience, the thing to be false, which the other jurors affirm to be true, and so he will not agree with them in giving a false verdiet, and this appeareth to the justices by examination; the jus-

tices as it seemeth, in such case, may take such order in the matter, as shall seem to them by their discretion, to stand with reason and conscience, by awarding a new inquest, or otherwise, as they shall think best by their discretion, like as they may do if one of the jury die before the verdict.

M. 4. G. 3. K. and Gould—The defendant was indicted for murder. The jury were sworn, and part of the evidence given; but before the trial was over, one of the jurymen was taken ill, went out of court with the judge's leave, and presently after died. The judge doubting whether he could swear another jury, discharged the eleven and left the prisoner in gaol. The court was moved for a writ of *habeas corpus*, to bring up the prisoner that he might be discharged, having been once put upon his trial. This being a new case, the court said they would advise with the other judges upon it; and afterwards they all agreed, that the prisoner might be tried at the next assizes: or the judge might have ordered a new jury to have been sworn immediately.

JUSTICES OF THE PEACE.

JUSTICES of the peace are judges of record, appointed to be judges within certain limits, for the conservation of the peace, and for the execution of the several statutes committed to their charge.

A record or memorial made by a justice of the peace, of things done before him judicially, in the execution of his office, is of such credit, that it shall not be gainsaid. One man may affirm a thing, and another man may deny it: but if a record once say the word, no man shall be received

to aver or speak against it: for if men should be admitted to deny the same, there would never be any end of controversies. Therefore to avoid all contention, while one saith one thing and another saith another thing, the law reposeth itself wholly and solely in the report of the judge. And from hence it followeth that he cannot make a substitute or deputy in his office, seeing that he may not transfer the confidence that is placed in him. Great cause therefore have the justices to take heed that they abuse not this credit either to the oppression of the individual, by making an untrue record, or the defrauding of the public, by suppressing the record that is true and lawful.

Hereof also it cometh, that if a justice of the peace certify to the superior court that any person hath broken the peace in his presence, upon this certificate such person shall be there fined, without allowing him any traverse thereto.

Of conservators of the peace at the common law.

Before the institution of justices of the peace in England, there were conservators of the peace in every county, whose office according to their names, was to conserve the king's peace, and to protect the obedient and innocent subjects from force and violence. These conservators, by the ancient common law, were by force of the king's writ, chosen by the freeholders at the county court out of the principal men of the county: after which election so made and returned the king directed a writ to the party so elected; to take upon him, and execute the office until the king snould order otherwise.

Conservators by office.

Besides these conservators of the peace, properly so called, there were and are other conservators

of the peace, by virtue of certain offices: as for instance:

1. The lord chancellor, and every justice of the king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizance for it.

2. Every court of record, as such, hath power to keep the peace within its own precinct.

3. Every justice of the peace is conservator of the peace.

4. Every sheriff is a principal conservator of the peace, and may without doubt, *ex officio*, award process of the peace, and take surety for it.

5. Every coroner is another principal conservator of the peace, and may certainly bind any person to the peace, who makes an affray in his presence. But it seems the better opinion, that he has no authority to grant process for the peace.

6. Also, every high and petit constable are by the common law conservators of the peace.

It is said, that if a constable see persons engaged in an affray, or upon the very point of entering upon it, as where one shall threaten to kill, wound, or beat another, he may imprison the offender of his own authority, for a reasonable time, till the heat shall be over; and also afterwards detain him till he find surety of the peace by obligation.

But it is said, that the constable hath no power to arrest a man for an affray done out of his own view: for it is the proper business of a constable to preserve the peace, not to punish the breach of it: nor doth it follow from his having power to compel those to find sureties who break the peace in his presence, that he hath the same power over those who break it in his absence.

Their duty.

The general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others; to arrest and pacify all such who in their presence, and within their jurisdiction and limits, by word or deed, shall go about to break the peace.

If a conservator of the peace, being required to see the peace kept, shall be negligent therein, he may be indicted and fined.

If the conservators of the peace have committed or bound over any offenders they are then to send to, or be present, at the next court of criminal jurisdiction; there to object against them.

Of justices of the peace.

In England, the office and duty of justices of the peace seems to depend principally upon the king's commission. In this country they are regulated by law; and it is not necessary to recapitulate in this place, what may be found at large in the territorial statutes.

Of their acting jointly and severally.

Whatsoever any one justice alone may do, the same also may lawfully be done by any two or more justices: but where the law giveth authority to two, there one alone cannot execute it.

Yet where a statute appointeth a thing to be done by two justices or more, if the offence be any misdemeanor or matter against the peace, there upon complaint made of the offence, to any of those justices, it seemeth that one of them may grant out his warrant to attach the offender, and to bring him before the same justice and the other justice so appointed, at some convenient place; and then they to hear and determine the same.

But it seemeth that when a thing is appointed by

any statute to be done, by or before one person certain, such thing cannot be done by or before any other; and by such express designation of one, all others are excluded, and their proceedings therein are *coram non judice.*

Limits of their jurisdiction

Here are two considerations: one is, that the justice cannot act when he is out of the county; and the other is, that when he is in the county, he can act for that county only, and his power extendeth to no other. But both these are to be understood with some limitations.

As to the former case, when he is out of the county: it is said that the justices have no *coersive* power when out of the county. Yet it is said, that recognizances and informations voluntarily taken before them in any place, are good.

Lord Hale says, that a justice of the peace may do a ministerial act out of his county; as examining a party robbed, whether he knows the felons: but that he cannot do a compulsory act, as committing a person for not giving recognizance.

As to the latter case, wherein it is supposed that his power is limited into that county only; it is enacted by the "act to provide for the more effectual administration of justice," that if any person against whom a warrant shall be issued, shall escape, go into, reside, or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, upon proof on oath of the hand writing of the justice granting such warrant, shall indorse his name thereon, which shall be a sufficient authority to execute the warrant within such other jurisdiction.

Lord Hale, treating on the subject of the jurisdiction of county justices within corporate towns, says, if the king by charter, grant to a corporation,

that the mayor and recorder, or other shall be justices within the same: yet if there be no words of exclusion, the justices of the county have a concurrent jurisdiction,

If a justice of the peace in cases where the debt exceeds the sum of which he has cognizance, will split the cause of action into lesser sums, in order to bring it within his jurisdiction: a prohibition will lie: or the superior court will even grant a rule to shew cause why an attachment should not go against him. (2 Hawk. 223.)

Justices being a party, not to act.

Regularly, justices of the peace ought not to execute their office in their own case; but cause the offenders to be conveyed or carried before some other justice, or desire the aid of some other justice, being present.

An order of removal of a poor person from Great Chart to Kennington, was quashed, because one of the justices who made the order was an inhabitant of Great Chart at the time, and charged to the poor rate there. And by the court, no rule of law or reason is more established, than that a judge ought to stand disinterested.

Yet in some cases, if the justice shall act in his own cause, it seemeth to be justifiable; as when a justice shall be assaulted, or in the doing his office especially, shall be abused to his face, and no other justice present with him; then it seems he may commit such offender until he shall find sureties for the peace or good behaviour, as the case shall require. In such casesindeed, he does not so properly act in his own cause as in that of the public; however, if any other justice be present, it were fitting to desire his aid.

Acting without authority.

If a justice exceed his authority, in gtanting a warrant, yet the officer must execute it, and is indemnified for so doing: but if it be a case where he hath no jurisdiction, or in a matter whereof he hath no cognizance, the officer ought not not to execute such warrant; so that the officer is bound to take notice of the authority and jurisdiction of the justice.

Thus if a justice send a warrant to a constable to take up one for slander, or the like, the justice hath no jurisdiction in such cases, and the constable ought to refuse the execution of it.

Not to condemn any person unheard.

In summary convictions, the party ought to be heard, and for that purpose ought to be summoned in fact; and if the justice proceed against a person without summoning him, it would be a misdemeanor in him, for which an information would lie. But this hath already been noticed under the article *Conviction*.

Of the records of justices.

In all cases where justices may hear and determine out of session, (viz. on their own view, or on confession, or on the oath of witnesses) they ought to make a record in writing of all the matters and proofs, a specimen of which will be found at the end of the article entitled *Convictions*.

The indemnity of justices.

A justice of the peace is strongly protected by the law in the just execution of his office. He is not to be slandered or abused. In the case of Aston and Blagrave, the plaintiff declared that he was a justice of the peace and that in a conversation concerning him and the execution of his office, the de-

fendant said "you are a rascal, a villain and liar." After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable. It was urged for the plaintiff, that there is a great difference between magistrates and common trades-men, Words of the latter must affect them in their particular way of dealing: but any thing that tends to impeach the credit of the former is actionable. The chief justice in delivering the opinion of the court, said that though *rascal* and *villain* were uncertain, yet being joined with *liar*, and spoken of a justice of the peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff.

So where it was said to a justice in the execution of his office "you are a rogue and a liar," it was held that the words were indictable, though it was acknowledged that the justice might at once have committed the party for his contempt. Where the words are spoken in the presence of a justice, then executing his office; he may commit: but where it is behind his back, the party can only be indicted for a breach of the peace.

Their punishment.

If a justice will not on complaint made to him, execute his office, or if he misbehave in his office; the party grieved may move the superior court for an information. But the most usual way of compelling justices to execute their office, is by a writ of *mandamus*, out of the superior court, which is a command requiring them to do the things specified therein.

A justice is not punishable at the suit of the party, but only at the suit of the government, for what he doth in his judicial capacity, in cases where the law authorises him to hear and determine: for regularly no man is liable to an action for what he

doth as a judge. But in cases wherein he proceeds imministerially rather than judicially, he is liable, if he acts corruptly, to an action at the suit of the party, as well as to an information at the suit of the government.

Wherever magistrates act uprightly though they may mistake the law, no information will be granted against them. But if they knowingly act improperly, the superior court will grant an information.

But a justice, said Lord Mansfield, shall not be liable to be punished both ways—that is both civilly and criminnally; but before the court will grant an information, they will require the party to relinquish his civil action, if any such be commenced; and even in the case of an indictment, though a true bill be actually found; yet the attorney general (on application made to him) will grant a *noli prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time.

LARCENY.

LARCENY is the offence of taking and carrying away, with the intent of stealing, the personal goods of another.

It may be either grand or petit.

If the property stolen, be above the value of twelve pence; it is grand larceny at the common law. If it be only of that value or under; it is petit larceny. Our statute law has extended petit larceny to all sums under twenty dollars.

Larceny may be simple or compound.

Simple larceny is the taking the goods of another with a felonious intent without force and nei-

ther from the house nor person. The general ingredients of the offence are the same both in grand and petit, in simple and in compound larceny.

1. *Of taking.*

The taking and carrying away are to be considered as one act, of which the carrying away evidences and executes the intent of the taking.

By the taking is understood some act of usurpation of property not grounded on the notion of legal right, and not included in the act of the owner; for if otherwise, in the one case it is a trespass, and in the other a breach of trust; but in neither a felony unless expressly so made by statute—*Gil. law of Ev. by Loft* 692.

As to a claim of right.

A man cannot be guilty of a felony in taking his own goods, unless where having bailed them to another, he afterwards steal or rob them in order to charge the bailee. Thus if A. deliver goods to B. to keep, and afterwards steal them from B. with intent to charge B. with the value; he is guilty of felony.

But if a man take another's trees and cut them into boards—or take another's cloth and make it into a coat—or mingle another's corn with his own, in all these cases, the owner may retake his boards, cloth, and the whole of the corn, or so much as cannot easily be distinguished from his own, without being guilty of felony.

And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal, for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy.

Analogous to the taking upon a claim of right,

is the taking by mistake arising from heedlessness, or from mere accident. As if one man's sheep mix with another's flock, and he drive them with his own or even shear them, not knowing or taking heed of the difference; it is no felony. But if he knew them to be another's as by having that other's mark which he defaces, and places his own mark on them: this is evidence of a felonious intent. So if he appear desirous of concealing the property, or of preventing the inspection of any who might make the discovery—2. *East's Crown Law* 659.

When a prisoner excuses the taking under the plea of a legal right, it must appear that he acted under such circumstances, that he did not merely avail himself of the law as a pretence, but had an idea of a legal claim: otherwise a taking even under process of law, may be given in evidence as a *felonious taking*, against the party thus wilfully abusing that process.

And thus saith Coke: if a man seeing the horse of B. in his pasture, and having a mind to steal him, cometh to the sheriff, and pretending the horse to be his, obtaineth the horse to be delivered to him by a replevin; yet this is a felonious taking, for the replevin was obtained by a fraudulent abuse of legal process.

And thus where a man who was an attorney had obtained a fraudulent judgment in ejectment where he had *no colour of title*, and took goods in the house to a considerable value; it appearing in evidence, that he sued out the ejectment merely to get possession and convert the goods to which he had no pretence of claim, to his own use, he had judgment of felony and was executed—*Gil.* 693.

On taking as a trespasser, without fraud.

The taking may amount only to a trespass, and

the circumstances in such case must guide the judgment. As where a man takes another's goods openly before him or before other persons, otherwise than by apparent robbery, or having possessed himself of them, avows the fact before he is questioned.

So where a man takes another's harrow or plow, and after plowing his own land returns it to the place whence he took it, or tells the owner of his using it. So taking a horse off the common, and after riding returning it there again, is but a trespass. But if the party had sold it, this would be declarative of the first taking being felonious—2 *East* 661.

Of the plea that the goods were delivered by the owner.

Where goods have been delivered to another, it is an important enquiry, whether the owner in making the delivery intended to part with the *property* or only with the *possession* of the thing delivered. For if he parted with the *property* and gave credit to the prisoner, by whatever fraudulent means he was induced to give the credit, though it may be a cheat, it cannot be larceny.

On the other hand, if the delivery was only for a *special purpose*, it does not clear the felony.

Mackenzie went to Spencer, and after looking at a horse, desired to know whether he would go quietly with the saddle on. Spencer delivered the horse to him for the purpose of trying him. Mackenzie rode away with him. This was adjudged horse stealing.

Thus a man hired a horse under pretence of taking a journey into Essex. This journey he never took, but sold the horse. by all the judges it was determined to be felony.

On an indictment for stealing ten guineas, the property of Joseph Wood, the evidence was the

wife of Joseph Wood and the account she gave was this; that being in want of change to pay some workmen, the prisoner told her that she knew a person who could give her ten guineas worth of half guineas, that she put down the guineas on the table, which the said prisoner took up, and under pretence of going for change, went out and never returned. On searching for her cloaths, it was found that they were gone. On this evidence she was found guilty.

On an indictment for stealing a note, the evidence was that it was delivered to the prisoner to discount; and it appearing that the owner never meant to part with the note, till the money was actually paid for it, and that the prisoner got it into his possession, with an original design of stealing it, this was adjudged felony.

A man went to a goldsmiths and ordered a quantity of goods to be sent home. The goldsmith directed his servant not to leave the goods without the money; but on some pretence the pretended purchaser sent back the servant and kept the goods. The judges held these circumstances to be evidence of a felonious taking—*Gilb.* 695.

If a person to whom goods are delivered has but the bare charge or custody of them, the legal possession remains in the owner; and the other may commit larceny by a fraudulent conversion of them to his own use. This rule holds most expressly in the case of servants, entrusted with the care of goods in the possession of their masters. The same rule applies to him who has a bare special use of goods, as in the case of a guest in the owner's house; for none of these persons have, properly speaking, the possession. So if a weaver or silk throwater deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it: it is felony: for the entire

property remains then only in the owner, and the possession of the workman, is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he having the lawful possession of it, had afterwards embezzled it: this would not be felony: because by the delivery he had a special property, and not a bare charge: in the same manner as one who is entrusted with the care of a thing for another to keep for his use.

If a merchant's or banker's clerk have access to the money room upon special occasions, or be sent to the drawer for money for a special purpose: or if he be sent to bring money generally out of the drawer; and at the same time he take the opportunity of purloining money for his own use: he is as much guilty of felony as if he had no allowed access to it whatever—2 *East* 682.

On an indictment for stealing a silver watch, the evidence was that the prisoner had been a year and a half journeyman to the prosecutor, who had entrusted him with a silver watch to clean. The prisoner had brought the watch back: but it not being perfect, the prosecutor had sent it to him again.

The owner wanting it, the prosecutor sent for it to the prisoner, and received for answer that it was not done, and on a second message, that it was lent out by the prisoner, which was found to be a falsehood. In reality it had been pawned by the wife of the prisoner. He was found guilty. The reader will see that the pawning by the wife must be understood to have been proved to be by the direction of the husband—*Gilb.* 694.

It will be observed that this case by no means corresponds with the general principle laid down above from Mr. East, that if the property be delivered to a journeyman *out of the house*, his conversion of it to his own use will not be felonious. Indeed there does not appear to be any natural

ground for the distinction between a workmans being in the house or out of the house of the employer: and a safer and more rational rule for distinguishing between felonious conversions and mere breaches of trust, will in the several cases which occur probably at all times be found in those particular circumstances of the case, which indicate the real intentions of the parties concerned.

If a person obtain both the property and possession of the goods of another by a lawful delivery *without fraud*; although he afterwards convert them to his own use, he cannot be guilty of felony. But if such delivery be obtained by fraud or falsehood, and with an intent to steal, though under pretence of hiring or even a purchase; if in the latter case no credit was intended to be given, the delivery in fact by the owner, will not pass the legal possession, so as to save the party from the guilt of felony. But if the *property* were intended to pass by the delivery, there can be no felonious taking.

In the case of a ring dropper where a man walking in a street with another, privately drops a ring or purse, and on pretence of finding it and dividing its produce with his companion, takes a watch or some other thing as a pledge for his proportion, goes off with it; This has been repeatedly adjudged to be felony.

Another consideration which ought to be taken into view, is by what acts the *privity of contract is determined*, so as to make the taking of the party with a felonious intent a new taking and trespass, even after a lawful delivery by the owner. In the case of the delivery of a horse upon hire or the like; if the delivery be obtained *bona fide*, no subsequent conversion *pending the contract*, will amount to felony.* But even in such case, if the

* Yet what difference in the eye of reason or justice can i

hiring be limited to a particular time or place, and after that time be expired or the party arrived at the proper place of redelivery, he ride away with the horse, and convert it to his own use, it will then be felony. For as was said by Gould, justice, in Charelwood's case, the end and purpose of the hiring, for which the delivery was made would then be over. And as the legal possession follows the right of property, as soon as the special property of the holder is determined, the legal possession reverts to the original owner, in the same manner as if there had never been any precedent delivery; after which any new taking by the party for his own use will in point of law be a trespass, and if it be done with a felonious intent to steal, of which the jury are to judge, it will amount to felony. In Tunnard's case, where he had borrowed a horse in the isle of Ely to ride three miles, instead of which he had ridden the horse up to London and sold it; Raymond, Denton and Hale, held it to be felony: because the privity was determined after he had ridden farther than the agreement warranted: but if there had been no such agreement; the privity would have remained, and the riding away would have been no felony:* and the chief justice who tried him having left it to the jury to consider, whether the prisoner rode away with the horse with intent to steal it, they found him guilty.

Perhaps the circumstances of that case would have warranted the finding of the jury, that the original hiring was a mere pretence, to steal the

make, if I hire a carriage to a man for fix days, whether he ſell that carriage and make off with the money on the firſt or on the ſeventh day? In vain ſhall we ſearch among legal precedents for uniformity and conſiſtency of principle. Perhaps indeed ſuch an inſtantaneous transfer would be regarded as evidence of felonious intent *ab initio*.

* But would not the *ſale* of it have been ſo.

horse, and therefore that the original taking was felonious.

There are however, some tortious acts before the regular completion of a contract, on which goods are delivered which may determine the privity of it, and amount in law to a new taking from the possession of the owner. This principle furnishes the well known distinction in the carrier's case, which seems to stand more upon positive law than upon sound reasoning.

If a man deliver goods to a carrier to carry to a certain place, and he carry them away, it is no felony. But it is otherwise, if he have a bale or trunk with goods delivered to him, and he break the bale or trunk and take and carry away the goods with intent to steal them. So if he carry the whole pack to the place appointed and then carry it away with intent to steal it; this is a felonious taking: for the delivery had taken effect and the privity of bailment was determined.

But that must be understood says lord Hale where he carries them to the place and delivers or lays them down; for then his possession by the first delivery is determined, and the taking afterwards is a new taking.

The separation of part of the goods delivered from the rest, with a felonious intent, seems to be material, where they are delivered as one entire body or mass, though no case or package be broken: because such an act equally evinces a determination of the privity of contract. Thus if a miller steal part of the meal though the corn were delivered to him to grind, yet this being taken out from the rest, it is felony.

Upon the whole of this head of delivery by the owner, it appears that several questions may arise for the consideration of the court and jury.

First, whether the delivery in fact to the prison-

er transferred the legal possession to him, or whether it remained in the owner.

Secondly, if the legal possession were intended to be transferred, but not the absolute property: whether such delivery were obtained fraudulently, and with intent to steal the property.

Thirdly, if obtained without such intent, whether the privity of contract were at an end at the time of the conversion, so as to amount to a new taking and trespass?

The consequences in each of these several alternatives have been already stated.—2. *East.* 693. —698.

2. *Of carrying away.*

What shall be evidence of carrying away in support of an indictment of larceny, may be collected from the jubjoined instances.

A guest took the coverlet or sheets off his bed, and rising before day, removed them out of the chamber where he slept into the hall, and went into the stable to fetch the horse, and the ostler apprehended him. These several acts were judged evidence of a felonious intent, and that there was a carrying away by removing the coverlet from the chamber into the hall, although it still were in the house of the owner.

3. *What species of goods are subjects of larceny.*

The things taken away must be personal goods: and therefore, where statutes have not interposed, things adhering to the freehold and removed in the instant of their severance from it, are not the subject of larceny. But if previously severed by the owner, they are; and so if the evidence establish their being severed at one time by the thief and taken after an interval of remaining severed, at another.

The property stolen must be such to which the law annexes value. Therefore the stealing of monkies, bears, foxes or dogs is not felony.

Though it is necessary that there should be a determinate property somewhere, and wild animals are not subjects of larceny; yet an indictment is maintainable for stealing the goods of a person unknown: for it is the public injury not the individual loss, which is the ground of a criminal prosecution.

The wife cannot be guilty of larceny from the husband, nor the husband from the wife: on account of their unity of interest.—*Gilb.* 697, &c.

LIBEL.

A LIBEL is a malicious defamation of any person, expressed either by printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule.

The communication of a libel to any person, is a publication in the eye of the law: and therefore the sending of an abusive private letter to a man, is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial, at the common law, with respect to the essence of a libel, whether the matter of it be true or false. In a civil action, indeed a libel must appear to be false as well as scandalous: but in a criminal prosecution the tendency which all libels have to create animosities and disturb the public peace, is the whole that the law considers. By statute however, the truth may be given in evidence.

MAIM.

MAIM or mayhem is the depriving of another by violence of the use of any of his members, so as to render him less able in fighting, either to defend himself or to annoy his adversary. And therefore the cutting off or disabling, or weakening of a man's hand or finger or striking out his eye or foretooth, or castrating him, are held to be maims: but the cutting off his ear or nose or the like are not held to be maims at common law, because they do not weaken but only disfigure him; and for the same reason the striking out of one of the jaw teeth is no maim at common law. The punishment is fine and imprisonment. The definition of maim is somewhat more comprehensive under that clause of our penal law, which is borrowed from a statute of Charles the 2nd. occasioned by an insult offered to Sir John Coventry, a gentleman then in parliament.

MAINTENANCE.

MAINTENANCE is an unlawful taking in hand or upholding of quarrels or suits to the disturbance or hindrance of common right, and is punishable by fine and imprisonment.

1. It may be in the *country*: as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty; or where one stirs up quarrels or suits in the country, in relation to matters in which he has no concern.

2. It may be in the *courts of justice*: as where one officiously intermeddles in a suit depending in a court, which no way belongs to him, by assist-

ing either party with money or otherwise, in the prosecution or defence of any suit. If it be done without contract for a share; it is simply *maintenance*. If the maintenor, be to have a part of the thing in suit; it is called *champerty*.

If he laboureth or endeavoureth to influence the jury; it is called *embracery*.

MANSLAUGHTER—See *Homicide*.

MISDEMEANOR.

THIS word in its usual acceptation is applied to all those crimes and offences, for which the law has not provided a particular name, and it extends likewise to all offences under the degree of felony. Misdemeanors are punished according to the degrees of the offences, by fine, or imprisonment, or both, and sometimes by being placed in the pilory.

MITTIMUS—See *Commitment*.

MURDER—See *Homicide*.

NUISANCE.

A NUISANCE is either the doing of a thing to the general annoyance of the people, or the neglecting to do a thing which the common good requires. Common nuisances are such inconvenient or troublesome offences as annoy the whole community in general and not some particular person, and therefore are indictable only and not actionable. Of this nature are all annoyances in roads, bridges and public rivers, by rendering the same inconvenient or dangerous to pass, by actual obstructions or by want of reparations. For both of these, the person so obstructing, or the person bound to repair, may be indicted and fined, and distrained to remove or repair them. Any one may remove a common nuisance in the highway.

Disorderly inns, tipling houses, gaming houses, bawdy houses, booths and stages for rope dancers, mountebanks and the like, are public nuisances, and may upon indictment be suppressed and fined. Inns or taverns may be indicted, suppressed, and the keeper thereof fined, for refusing to entertain a traveller, without a very sufficient cause.

Also eaves-droppers, or such as listen under walls or windows, or the eaves of a house to hearken after discourse, and thereupon to frame slanderous or mischievous tales, are indictable as a nuisance, and punishable by fine, and finding sureties for the good behaviour.

Also a common scold is a public nuisance to her neighbourhood, for which if convicted she shall be placed on the ducking stool * and be plunged in water.

* The statute of 51 Henry III. A. D. 1266 it is called *tre-bucketum*, probably from *tre* which is said to be the same as *ville*, and our common word *bucket*. It will then signify the town or *village bucket*.

The master of a family is liable if any of his family lay or cast any thing out of his house into the street or public highway to the damage of any individual, or to the common nuisance of the citizens.

PERJURY.

PERJURY is a wilful false oath, by one who being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question, whether he be believed or not.

The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath, or before some magistrate or proper officer having such power, in some proceeding relative to a civil suit or criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them . for which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent on every petty occasion; since it is more than possible that by such idle oaths, a man may frequently incur the guilt, and at the same time evade the temporal penalties of perjury.

The perjury must also be wilful, positive and absolute, and not upon surprise or the like.

It must also be upon some point material to the question in dispute, for if it be only in some trifling circumstance to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned.

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal.

For the punishment of both offences, see the statutes page 316.

POLYGAMY.

POLYGAMY is the having of more than one wife or husband at the same time.
It is punishable by our laws. See statutes p. 321.

PRESENTMENT.

A PRESENTMENT is a representation made by the grand jury to the court, in cases where no indictment has been previously delivered to them, as of a felony, misdemeanor, nuisance, or the like. It is afterwards reduced into the form of an indictment by the proper officer, and in itself, indeed, differs from an indictment only in the want of technical formality. The word *presentment* is a bad translation of an unclassical Latin word formerly used in legal proceedings, and means, in fact, nothing more than a *statement* or *representation*.

If a grand jury present any thing but offences properly cognizable in the court, such presentments cannot be regarded as official acts, and it should seem that the court cannot properly receive them.

RAPE.

RAPE is the carnal knowledge of a woman forcibly and against her will, and is punished with death.

The party ravished, though under twelve years of age, is a competent witness. Her credibility will vary with circumstances, such as her character, the time she made the discovery, &c.

RECOGNIZANCE.

A RECOGNIZANCE is a bond or obligation of record, testifying the recognizor to owe a certain sum of money to some other; and the acknowledging of the same is to remain of record: and none can take it but a judge, or justice, or officer of record.

If a justice compounds recognizances, and does not return them to the court, he may be indicted.

As soon as a recognizance is taken or acknowledged and reduced into writing by a judge or justice, or other proper officer, it is a record.

Whenever any statute gives power to a justice to take a recognizance or to bind over any man to appear at the county or superior court, or take sureties for any matter or cause, or where he has this latter power as incidental to his office (as in requiring sureties for the peace or good behaviour) or wherever he has authority given him to cause a man to do a thing; he may bind the party by recognizance, or send him to gaol if he refuses to be bound or will not find sufficient sureties. In cases to be tried, or where the party is to appear in the superior court; the recognizances must be sent to that court.

General form of a Recognizance.

Jefferson County. } Be it remembered, that on the day of in the year of our Lord, 1807, A. O of in the county aforesaid, planter, and A. S. of in the county aforesaid, taylor, personally came before me, J. P. esquire, one of the justices of the peace in the said county, and acknowledged themselves to owe to the governor of the Mississippi territory; that is to say, the said A. O. the sum of one hundred dollars, and the said A. S. the sum of one hundred dollars, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of the Mississippi territory, if the said A. O. shall make default in the condition underwritten.

The condition of the above written recognizance is such, that if the above bound A. O. shall then the said recognizance to be void, or else remain in its force.

Acknowledged before me,

J. P.

RECORDARI FACIAS LOQUELAM.

THE writ which from the words used in it goes by this name, usually issues in this country (says judge Haywood of North Carolina) for removing proceedings from before justices of the peace into the superior court; where it evidently appears that justice has not been done before the magistrate below, and that the party has been unjustly hindered or deprived of his appeal to the county court: and sometimes, it is for the purpose of enabling the superior court to view and examine into the proceedings, and either to reverse or confirm them

as there shall be occasion. This writ commands the sheriff to cause to be recorded the proceedings before the justice, and to return them into the superior court on a prefixed day, and also to give notice to the party to appear on that day in the superior court.

Every justice of the peace should keep the proceedings by him, in order that the sheriff may copy them, if required so to do by this writ.

But if the proceedings are not preserved, still on application of the sheriff, the justice should give in writing a true account of the proceedings, that the sheriff may reduce the same to writing and make a record thereof to be returned to the superior court, and the justice should certify the same to be true.

This writ closes up the hands of the justice from the time of its being issued: so that all proceedings after that time are void: but all such proceedings should notwithstanding be returned into the superior court.

Form of the writ.

The Mississippi Territory of the United States to the sheriff of county, greeting;

You are hereby commanded to go in your proper person to J. P. esquire, one of the justices of the peace for the said county, and cause to be recorded, the plea which is (*or* was lately) depending before him, without writ, between P. plaintiff, and D. defendant: and have you that record, under your seal, before the court of the county of on the day of next: and appoint the same day to the parties that they may then be there, to proceed in that plea, as justice may require; and have you then this writ also before the said court.

Witness, &c.

Upon the receipt of this writ the sheriff applies to the justice and makes up a record of the proceedings as above mentioned, and annexes the same to the writ, and thereupon makes a return thus:

By virtue of this writ H. S. sheriff of the said county, sends his answer, that he in his proper person hath gone to the aforesaid justice on the day of in year of our Lord and hath caused the plea to be recorded, which was depending before him without writ between the parties aforesaid, and that record is as follows:

Here follows the record of the proceedings.

RESCUE.

A RESCUE signifies a forcible setting at liberty against law, a person arrested by the process or course of law.

It is necessary that the rescuer should have knowledge that the person is under arrest for a criminal offence, if he be in the custody of a private person; but if he be in the custody of an officer; there, at his peril, he is to take notice of it.

Although a *prison breaker* may be arraigned for breaking a prison, before he is arraigned of the crime for which he was imprisoned; yet he who rescues one imprisoned for felony, cannot be arraigned for such offence, as for a felony, till the principal offender be attainted: but he may be immediately proceeded against for a misprision. He may therefore, it should seem, be proceeded against under the act of Assembly (Statutes p. 318) where it seems to be considered only as a misdemeanor.

A hindrance of a person to be arrested, that has committed felony is a misdemeanor, but no felony: but if the party be arrested and then rescued; if

the arrest was for felony, the rescuer is a felon: if for treason, a traitor, by the common law, and if for a trespass only, then he is fineable.

RESTITUTION OF STOLEN GOODS.

If any person be convicted of larceny, the party robbed, who is notwithstanding a competent witness, shall have full restitution of his money, goods and chattels or the value of them, out of the offenders goods if he has any, by a writ to be granted by the judges. This writ of restitution shall reach the goods so stolen notwithstanding the property of them is endeavoured to be altered by a sale: or else without such writ of restitution, the party may peaceably retake his goods wherever he happens to find them, unless a new property be fairly acquired therein.

RIOT, ROUT AND UNLAWFUL ASSEMBLY.

RIOTS, routs and unlawful assemblies must have three persons at least to constitute them. *An unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein, and part without doing it or making any motion towards it. *A rout* is when three or more meet to do an unlawful act, upon a common quarrel, as forcibly breaking down fences, upon a right claimed of common, or of way, and make some advances towards it. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel,

as if they beat a man, or do any other unlawful act with force and violence, or even do a lawful act as removing a nuisance, in a violent and tumultuous manner. The punishment is by fine and imprisonment, to which the pillory in very enormous cases has been sometimes superadded.

RENT.

UNDER this head, I shall merely make a few observations on the subject of distresses.

A distress is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.

The most usual injury for which a distress may be taken is that of non-payment of rent. Likewise where a man finds the beasts of a stranger wandering in his grounds, *damage feasant*, that is doing him hurt or damage, by treading down his grass or the like; the owner of the soil may distrain them, till satisfaction be made to him for the injury he has thereby sustained.

As to the things which may be taken in distress, it is a general rule that all chattels personal found on the premises, tho' belonging to a stranger are liable to be distrained unless particularly protected or exempted.

Thus whatever is in the personal use or occupation of any man, is for the time privileged and protected from distress, as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart may, cart and all, be distrained for rent arrear. Also if a horse tho' a man be riding him be taken trespassing in another's grounds, the horse (notwithstanding his ri-

der) may be distrained and led away to the pound. Valuable things in the way of trade are not liable to distress; as a horse standing in a smith's shop to be shoed or in a common inn, or cloth at a taylor's house, or corn sent to a mill or a market.—So a man's tools and utensils of his trade, beasts of the plow and sheep are privileged from distress at common law. Milk, fruit and the like cannot be distrained, because it cannot be restored in as good a plight. Things fixed to the freehold, as windows, doors, and corn growing cannot be distrained.

All distresses must be made in the day time, unless in the case of beasts doing damage. When a person intends to make a distress, he must by himself or another in his behalf enter on the demised premises during the continuance of the lease. He cannot break open a house; but being in the house, he may break open an inner door.

When the distress is taken, it must in the first place be carried to some pound, and there impounded by the taker.

If the pound be a *common* pound-overt or uncovered pound, the owner must take notice of it at his peril; but if it be a *special* pound-overt so constituted for the particular purpose, the distreinor must give notice to the owner, and in both cases, the owner is bound to provide the beasts with food and necessaries. But if they are put into a pound-covert, as a stable or the like, the landlord or distreinor must feed and sustain them. A distress of household goods or other dead chattels, which are liable to be stolen or damaged by weather ought to be impounded in a pound-covert, else the distreinor must answer for the consequences.

When impounded, the common law * regards

* Several acts of parliament not in force here have made provision for the sale of the goods distrained towards satisfaction

the goods only in the nature of a pledge or security to compel the performance of satisfaction, and upon this account it hath been held that the distreinor is not at liberty to work or use a distreined beast. They must remain impounded till the owner makes satisfaction, or contests the right of distreining by replevying the chattels. To *replevy*, is when a person distreined applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit at law, and if that be determined against him, to return the cattle or goods once more into the hands of the distreinor.

ROBBERY.

ROBBERY is a species of compound larceny, and is the felonious and forcible taking of goods from the person of another;—*or* the taking of the property of another, in his presence by violence or threats, without the notion of legal claim.

An assault with an intent to commit robbery is punishable by fine and imprisonment—*Stat.* 307

To constitute robbery there must be an actual *taking*: but the *value* of the property makes no difference in the legal constitution of this crime.

The absolute or qualified owner of the goods must be *present*: for it is the danger or apprehension to which this attack renders him liable which characterises this offence: and where his presence is such as to come within this consideration, the taking is in law a felonious taking from the person; though the goods may not actually be carried about

of rent and charges, if the tenant do not replevy the same within five days.

him; as where one drives away the sheep or other cattle of another before his face.

It must be by *violence or threats*: and the natural concomitant of these being some degree of fear in the party thus assaulted or threatened; *putting in fear* is a circumstance that enters into the legal *description* of the crime.

It is sufficient however, if the goods be taken by violence: fear will be presumed. Mary Roberts was carrying a basket with linen. A young man came by and snatched the linen off her basket and ran away with it. It is said that on this evidence, the prisoner was found guilty of robbery.

Property being once taken, the offence is complete. If a highwayman demand my money, and I give it up: he is guilty of robbery, even though he return it again immediately.

With regard to *threats*, it is not necessary that these should import loss of life, or direct corporal injury from the immediate act of the threatener.—It amounts to the crime of robbery, if there be threats of bringing a person into *danger*, used to extort from him his property.

Thus a *threat* to accuse a person of a *capital felony*, and thereby obtaining money from him, is an actual robbery—*Loft's Gilb.* 707.

So likewise it is robbery to extort money from a person by threatening to charge him with an unnatural crime: though he parted with his money only from fear for his character and from no other fear.

So where the prisoners threatened to bring a mob from Birmingham (then in a state of riot and disturbance) and *burn the prosecutor's house down*, if he did not give them money, which he did under fear of that threat; it was held to be robbery—2 *East's Cr. Law* 728.

A prisoner may be acquitted of the robbery, if the evidence will not maintain it, and found guilty

of the simple larceny ; in the same manner as he may be acquitted of burglary and found guilty of the larceny on an indictment for burglariou-ly entering a house and stealing therefrom—*See* 2 *East p.* 515 & 784.

SEARCH WARRANT.

A PRACTICE at one time existed among the justices in England to grant general warrants to *search all suspected places, as the constable and party complaining should think convenient.* This practice, however, is justly condemned by the best authorities, as vesting a ministerial officer and the injured party, with the power of committing without bounds, acts of great vexation and oppression. The constitution of the United States limits the federal judiciary and others acting under federal authority by a rule founded in reason and justice. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated ; and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

In case of a complaint and oath made of goods stolen, and that the party suspects that the goods are in such a house and shews the cause of his suspicion ; the justice may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some other justice, to give an account how he came by them, and farther to abide such order as shall be agreeable to law.

It is proper that such warrant should require the search to be made in the day time; but if there be not merely probable suspicion, but positive proof, it is right that the warrant should be executed at any time, lest the offenders and goods should be gone before morning.

Such warrant ought to be directed to a public officer and not to a private person, though it is fit that the party complaining should be present and assisting.

As to the mode of execution.

The doors being open, the officer and his assistants may enter in the day time, whether the goods be there or not.

If they be shut, and are not opened on demand, the officer may break them open, if the stolen goods be there.

If they be not there: still the officer is excusable; but the party who made the suggestion is punishable;—as to him the lawfulness of the breaking open of the doors, depends on the event. If the goods be there; it is lawful; if they be not, it is unlawful.

As to the conduct of the justice on the return of the warrant.

The goods are to be restored to the possessor, if it appear that they were not stolen.

But if it appear that they were stolen; they are not to be delivered to the proprietor, but deposited in the hands of the sheriff or coustable, in order that the party may proceed, by indicting and convicting the offender to obtain restitution.

As to the party who had the goods.

If they were not stolen; he is discharged. But

if they were stolen, but not by him but by another that sold or delivered them to him, and it appears that he was ignorant of their having been stolen; he may be discharged as an offender, but bound over to give evidence as a witness against him that sold them to him.

If it appear that he knew that they were stolen; he must be committed or bound over to answer the felony.

Form of a search warrant.

Wilkinson County } The Mississippi territory of the United States to the constable, &c.

WHEREAS it appears to J. P. esquire, one of the justices assigned to keep the peace in the said county, by the information and oath of A. I. of in the county aforesaid, yeoman, that the following goods, to wit have, within days last past, by some person or persons unknown, been feloniously taken, stolen and carried away out of the house of the said A. I. at aforesaid in the county aforesaid, and that the said A. I. hath probable cause to suspect; and doth suspect, that the said goods or part thereof are concealed in the dwelling house of A. O. of in the said county, yeoman; these are therefore to authorise and require you with necessary and proper assistants, to enter in the day time into the said dwelling house of the said A. O. and there diligently to search for the said goods: and if the same or any part thereof shall be found upon such search, that you bring the goods so found and also the body of the said A. O. before the said J. P. or some other justice of the peace of the county aforesaid, to be dealt withal and disposed of according to law. Given under the hand and seal of the said J. P. at in the said county, &c.

SHERIFF.

THE sheriff, says Sir William Blackstone, is an officer of very great antiquity in this kingdom; his name being derived from two Saxon words, signifying the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl, or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls, in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden; reserving to themselves the honor, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl: the king, by his letters patent, committing the safe keeping of the county to the sheriff, and him alone.

The sheriff, as the keeper of the public peace, may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the peace. He may, and is bound, *ex-officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of her enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse commitatus*, or power of the county; which summons every person above fifteen years old, is bound to attend, upon warning under pain of fine and imprisonment.

In his ministerial capacity, the sheriff is bound

to execute all process issuing from the courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail: when the cause comes to trial, he must summon and return the jury: when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As the bailiff of the government it is his business to preserve the rights of the commonwealth within his bailiwick; for so his county is frequently called in the writs: a word introduced by the princes of the Norman line, in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties.

Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and if they suffer any such to escape, the sheriff shall answer it to the government, if it be a criminal matter: or in a civil case to the party injured.

The sheriff having a justice of the peace's warrant directed to him, shall execute the same; but he need not go in person to execute it, but may authorise another to do it.

It is no excuse to the sheriff to return, that he could not execute a precept because of resistance: for he may take with him the power of the county.

Also the sheriff on summons, is bound to attend the courts of justice; there to return his precepts, to take the charge of the prisoners, and the like.

It seems clear from the general reason of the law, which gives all courts of record a kind of discretionary power over all abuses by their own officers,

that the sheriff is punishable by the court for defaults in executing their writs and precepts.

In all civil causes, as in cases of imprisonment for debt, the sheriff or gaoler, at the election of the party, shall be answerable for escapes suffered by the gaoler: but if the gaoler suffer a felon voluntarily to escape, this, inasmuch as it reacheth to life, is felony only in the gaoler, but the sheriff may be indicted, fined and imprisoned.

STATUTES.

General rules to be observed in the construction of statutes.

1. REGULARLY, a statute in the affirmative doth not repeal a precedent affirmative statute.

But if the latter is contrary to the former, it amounteth to a repeal of the former.

2. A statute made in the affirmative without any negative expressed or implied, doth not take away the common law; and therefore the party may wave his benefit by such statute, and take his remedy by the common law.

3. By the repealing of a repealing statute, the first statute is revived.

4. Regularly, where a statute giveth a power or interest to one person certain, by this express designation of one, all others are excluded.

5. In all cases, where justices may take examinations, or other accusations or proof, though the statute doth not expressly set down that it shall be upon oath, yet it shall be presumed that the legislature intended that it should be upon oath.

6. Generally, it is holden, that where a statute appoints a thing to be done by one or more justi-

ces, without giving any appeal to the county court, there the justices in the county court may do that thing; but where an appeal is given to the county court, the justices of the county court cannot proceed originally therein, because that method would take away the power of appealing.

7. Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment or action of debt, or information, without mentioning an indictment; it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment: yet it hath been adjudged, that if such statute give a recovery by action of debt, bill, plaint, information, or otherwise, it authorises a proceeding by way of indictment.

8. If there be a prohibitory clause in the act, the offender may be indicted on the prohibitory clause, notwithstanding the penalty. But it is otherwise, where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedy.

9. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding; there either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because in that case the sanction is cumulative, and doth not exclude the common law proceeding.

10. But every contempt of a statute is indictable, where no other punishment is limited.

11. Wheresoever a statute doth generally prohibit any thing, the party grieved shall not only have his action for his private relief, but the offen-

der shall be punished at the suit of the state, for the contempt of the law.

12. The preamble or rehearsal of a statute is deemed true; and therefore good arguments may be drawn from the preamble. But the preamble shall not restrain the operation of the enacting part: as where the preamble reciteth only a particular inconvenience, this shall not hinder a subsequent enacting clause from being understood in that more general sense which the words would otherwise, and of themselves import, so as to take in other inconveniences of the like kind, although not specified in the preamble.

13. Where a statute directs the doing of a thing, for the sake of justice, or the public good, the word *may*, is the same as the word *shall*: as where the statute of the 13 and 14 *C.* 2, *c.* 12, enacts, that the overseers may make a rate to reimburse the constables, this is construed they *shall*: for they are compellable so to do.

14. It is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words. Thus, where a statute speaks of indictments to be taken before justices of the peace, or others having power to take indictments, it has been understood only of other inferior courts, and not of the king's benoh, or other court at Westminster.

15. Where a statute gives power to the justices, to require any person to do a thing, as to take the oaths, the law implicitly gives them power to issue their precept to have the body before them. For when the law granteth any thing to any one, that also is granted, without which the thing itself cannot be. It is against the office of the justices, and the authority given them by the law, that they shall go and seek the parties.

16. Where a statute gives power to the justices of the peace, to hear and determine an offence in a summary way; it is necessarily implied, and supposed, as a part of natural justice, that the party be first cited, and have opportunity to be heard, and answer for himself.

17. Where a statute gives power to two justices finally to hear and determine an offence, or to do any other judicial act, it is necessarily supposed that they shall be both together; or which is the same thing, in other words, that they shall hold a special session for that purpose. For it is unknown to our laws, that two persons shall act as judges in the same cause, when at the same time one of them is in one part of the county and the other in another.

18. Where a statute appoints a conviction to be on the oath of one witness, this ought not to be by the single oath of the informer, if he be entitled to a part of the penalty, unless he be made competent by the statute.

19. Where a statute directeth, that a person shall be convicted of an offence, upon the oath of one or more witnesses, and saith nothing of the confession of the party; yet if the offender shall, before the justice confess the offence, he may be convicted upon such confession. For confession is stronger evidence than the oath of witnesses.

20. Where a statute gives power to the justices of the peace, to take order in any matter, according to their discretions, this shall be understood according to the rules of reason, law, and justice, and not by private opinion.

21. It may be laid down as an invariable rule, that the law favours liberty: so that in the construction of a penal statute, where the interpretation is dubious, that sense must be pursued, all other things being equal, which is more beneficial to the

subject, or the party suffering. This principle has been carried to a fanciful extent. Thus, where an act directs, that the justices shall commit an offender to prison for twelve *months*, it has been said that the justices may not alter the words, and commit him for a *year*; for in this respect, 12 months and one year are not the same: but the months must be computed at 26 days to the month, and not as calender months, unless it be so expressed in the act.

22. To say that a person shall forfeit generally, or that he shall forfeit to the state, is all one; for the state shall have forfeiture, not otherwise limited.

Except where a forfeiture is given in lieu of property and interest; for there it shall go to the party injured.

For wheresoever a statute giveth a forfeiture or penalty, against him which wrongfully detaineth or dispossesseth another of his duty or interest; in that case, he that hath the wrong shall have the forfeiture or penalty, and shall have an action for the same upon the statute; and the state shall not have the forfeiture in that case.

23. It is said, that wheresoever a justice of the peace is empowered, by any statute, to bind a person over, or to cause him to do a certain thing, and such person being, in his presence, shall refuse to be bound, or to do such thing; the justice may commit him to remain there till he shall comply.

24. When a statute appoints imprisonment, but limits no time when; it shall be immediately.

25. When a statute appoints imprisonment, but limits no time how long; the prisoner in such case must remain at the discretion of the court.

26. Wherever a statute makes any offence felony, it incidentally gives it all the properties of felony at common law.

27. Therefore a statute that makes an offence felony, doth consequently induce the punishment of concealing, that is, misprision of felony: and every offence made felony by act of the legislature, includeth misprision.

28. An act making a new felony, extendeth not to infants under fourteen years of age; but if they be of that age it binds them.*

29. Not only those crimes which are made felonies by the express words of any statute, but also those which are decreed to have, or undergo judgment of life and member, do become felonies thereby, whether the word felony were mentioned or not.

30. Upon an indictment or other criminal prosecution, no damages can be given to the party grieved. But it is every day's practice in England, in the court of king's bench, to induce defendants to make satisfaction to the prosecutors, by intimating an inclination on that account, to mitigate the fine due to the king.

31. Where a statute gives treble damages, the justices are not to assess the damages, and then treble them; but the jury ought to find the damages, and then the justices are to treble them.

32. An act inflicting a penalty for a second offence, must always be understood, after conviction and judgment for the first offence; and the second offence must be committed after the first conviction, and judgment thereupon given: for it doth not appear to be an offence, until judgment, by proceeding of law, be given against the offender.

* This rule, however, muſt be adopted with ſome qualification. It is a general principle in the Engliſh law, that during the interval between the age of 14 and that of 7, the mind ſhall be *preſumed* to be unacquainted with guilt, unleſs the contrary appears from the evidence. But if from pregnant circumſtances, it is evident that the offender, being above the age of ſeven, was perfectly conſcious of the nature and malignity of the crime, the verdict of a jury may find him guilty, and judgment of death may be given againſt him.

33. And the indictment for a second offence, must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved: but the matter of the first conviction shall never be re-examined, but must stand for granted.

SUMMONS.

IN all legal proceedings the person complained of ought to have notice of the charge laid against him, and to have an opportunity of being heard in his own defence. Consequently, where a person is accused before the justices; they ought to summon the party to appear, or issue their warrant to bring him before them. The manner of convening the parties is sometimes directed by the statute creating the offence; but where it is left discretionary in the justices, it seems most agreeable to the mildness of our laws to put the party to no more inconvenience than is necessary; and therefore where the case will bear it, a summons seems to be preferable to a compulsory process. But in case of sureties of the peace, larcenies and other felonies, where the commonwealth is a party, and also in cases between citizen and citizen, where the body of the offender is liable, a warrant is the regular process and not a summons.

In the summons it is usual, and upon many accounts convenient, to fix not only a day, but a particular time of the day, for the party's appearing; but if he shall appear at that time and the justice shall not attend; he is not to go away, but must wait during the remaining part of the day; for many things may happen to hinder the justice's immediate attendance.

If the defendant after having been duly summoned, in the case of debt, fail to appear at the day and place appointed, judgment may be given against him by default, unless reasons be shewn to the justice for his non-attendance, as sickness or some inevitable hindrance: in which case the cause may be adjourned to some other day, or to another day and place.

If the defendant appears and is not ready for trial for want of a witness, papers or the like, and will satisfy the justice on oath that the same are material and necessary for his defence in that warrant, and that although he has used all due diligence, to procure the thing or witness wanting, that he has not been able to do so, or if he will alledge on oath any other cause, for which it is just to give him farther time; in all such cases the justice may in his discretion put off the trial to another day, or to another day and place.

If the plaintiff fail to appear; the warrant may be dismissed unless good reason appear before the justice for putting off the cause as above.

Upon every judgment or dismissal, the party in whose favor it is, must have costs.

General form of a summons.

Adams County. } The Mississippi Territory of the United States, to the constable, &c.

Whereas information and complaint hath been made before J. P. esq. one of our justices of the peace for the said county, that A. O. of in the county aforesaid, labourer, on the day of now last past, at in the county aforesaid, did *(here set forth the offence as charged in the information)* these are therefore to require you forthwith to summon the said A. O. to appear before the said J. P. esq. at

in the said county, at the hour of in the forenoon of the same day, to answer to the said information and complaint, and to be farther dealt withal according to law. And be you there at the same time, to certify what you shall have done in the premises. Herein fail you not. Given under the hand and seal of the said J. P. the day of in the year of our Lord .

Summons of a witness.

Adams County. } The Mississippi Territory, &c.
} To, &c.

Whereas information hath been made before J. P. esquire, one of our justices of the peace for the said county, that *(here set forth the substance of the complaint)* and that A. W. of in the same county, yeoman, is a material witness to be examined concerning the same; these are therefore to require you to summon the said A. W. to appear before the said J. P. at in the said county, on the day of at the hour of in the forenoon of the same day, to testify his knowledge concerning the premises. Herein fail you not. Given under the hand and seal of the said J. P. the day of in the year of our Lord .

Summons for debt.

Adams County. } The Mississippi Territory, &c.

Summon C. D. to appear before J. P. esq. one of the justices of the peace of the said county, at on the day of at the hour of to answer A. B. of a debt not exceeding twenty dollars. Given, &c.

Subpœna for a witness.

Adams County. } The Mississippi Territory, &c.
To E. F. of, &c.

You are hereby summoned to appear before J. P. esq. one of the justices of the peace for the said county, on Monday the day of at o'clock in the forenoon of that day to give evidence in a certain cause depending before him, at the suit of A. B. against C. D. for a debt not exceeding twenty dollars, on the part of the plaintiff. And hereof fail not at your peril. Given, &c.

Writ of Execution.

Adams County. } The Mississippi Territory, &c.

Whereas A. B. hath obtained judgment before J. P. esq. one of our justices of the peace for the said county, against C. D. for a debt of with costs; these are therefore to command you to levy the said debt and costs of the goods and chattels of the said C. D. by distress and sale thereof; returning the overplus, if any, to the said C. D. But for want of such effects, then take the body of the said C. D. and convey him to the gaol of the said county, there to be detained until the debt and costs aforesaid shall be paid or satisfied, or he shall be otherwise legally discharged. Given, &c.

SURETY FOR THE PEACE AND GOOD BEHAVIOUR.

ANY justice of the peace, and any who by virtue of their offices are conservators of the peace, may demand security for the peace or for the good behaviour, according to their own discretion, or at the request of any citizen upon due cause shewn.

Wives may demand it against their husbands, or husbands, if necessary, against their wives. But feme-coverts and infants under age, ought to find security by their friends only and not to be bound themselves; for they are incapable of engaging themselves to answer any debt, which is the nature of these recognizances or acknowlegments.

Any justice of the peace may by virtue of his office, bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendants, to the terror of the people—and all such as he knows to be common barretors, and such as are brought before him by the constable for a breach of the peace in his presence, and all such persons as having been before bound to the peace, have broken it and forfeited their recognizances. Also wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury by killing, imprisoning or beating him —or that he will procure others to do so; he may demand surety of the peace against such person; and every justice of the peace is bound to grant it if he who demands it will make oath that he is actually under fear of death or bodily harm, and will shew that he has just cause to be so, by reason of the other's menaces, attempts or having lain in wait for him, and will also farther swear, that he does not require such surety out of malice or for mere

vexation. This is called *swearing the peace* against another; and if the party does not find such sureties as the justice in his discretion shall require; he may be immediately committed till he does.

Such recognizance for keeping the peace when given may be *forfeited* by any actual violence or even an assault or menace to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace, or more particularly by any one of the many species of offences which are regarded as crimes against the public peace, or by any private violence committed against any individual.

But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion) unless they amount to a challenge to fight.

The doctrine of the English books relating to the cases in which security for the *good behaviour* may be demanded, has reference principally to the statute of the 34th of Edward III. c. 1. which not being now in force in this territory, it is not necessary to refer to it. Our own statutes point out some cases in which security for the good behaviour ought to be required.

A recognizance for the good behaviour may be forfeited by all the same means as one for the security of the peace may be; and also by some others. As by going armed with unusual attendance, to the terror of the people, or by committing any of those acts of misbehaviour, which the recognizance was intended to prevent.

Either recognizance may be discharged, by the death of the principal party bound thereby, if not before forfeited, or by order of the court to which such recognizance is certified by the justice, if they see sufficient cause, or in case he at whose request it was granted, if granted upon a private account will release it, or does not make his appearance to pray that it may be continued.

Warrant for the peace or good behaviour.

Wilkinson County. } The Mississippi Territory &c.

FORASMUCH as A. I. of in the said county, tailor, hath personally come before J. P. esquire, one of our justices of the peace for the said county, and hath taken a corporal oath that he the said A. I. is afraid that A. O. of in the said county, yeoman, will beat, wound, maim, or kill him, the said A. I, and hath therewithal prayed surety of the peace against him the said A. O. [or if for the good behaviour then say, " hath taken a corporal oath that A. O. of in the said county, yeoman, hath threatened to burn the house of him the said A. I. and hath therewithal prayed surety of the peace against him the said A. O."] Therefore we command you, that immediately upon the receipt hereof you bring the said A. O. before the said J. P. esquire, to find sufficient surety as well for his personal appearance at the next court to be holden in and for the said county, and also for our peace in the mean time to be kept towards us and all our people, and chiefly towards the said A. I. that is to say that the said A. O. shall not do nor by any means procure or cause to be done any of the said evils to any of our said people and especially to the said A. I. [*or if for the good behaviour* then add " as also for his good behaviour in the mean time towards us and all our people and espe-

cially towards him the said A. I."] Witness the said J. P. esquire at in the said county, on the day of in the year of our Lord

TAVERNS.

THOSE regulations which have been made by act of assembly for the especial government of houses, where spirituous and fermented liquors are retailed, will be found in the "act to regulate taverns and restrain tipling houses."

But there are some common law principles which apply generally to all houses for the lodging and entertainment of travellers; and though where liquors are to be sold a licence is necessary; yet it seems that any person may open an inn to lodge travellers without any licence. But the keeper of such an inn as well as of a licenced tavern, may by the common law be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves, or persons of a scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices. An inn-keeper may detain the person of a guest who eats, or the horse which eats, till payment. And this he may do without any agreement for that purpose. But an horse committed to an inn keeper may be detained only for his own meat, and not for the meat of the guest or of any other horse; for the law is open for such debts and doth not suffer private persons to take reprisals.

An inn-keeper that detains a horse for his meat, cannot use him, because he detains him as in the custody of the law, and consequently the detention must be in the nature of a distress, which cannot be used by the distrainer.

Inns were allowed for the benefit of travellers who have certain privileges, whilst they are on their journies, and are in a more peculiar manner protected by the law. It is for this reason that the inn-keeeper shall answer for those things which are stolen within the inn: though not delivered to him to keep, and though he was not acquainted that the guests brought the goods to the inn: for it shall be presumed to be through his negligence or occasioned by the fault of him or his servants.

So if he puts a horse to pasture without the direction of his guest, and the horse is stolen; he must make satisfaction. It is otherwise if he were sent to pasture by direction of the guest. Nor shall an inn-keeper be answerable for any goods left at his house by a guest, which are stolen whilst the owner is gone to some other place.

TECHNICAL TERMS.

As several words have occasionally been used in this *magistrates assistant*, as well as in the statutes, which may not be generally understood and which, indeed, have only an arbitrary meaning, it was thought that the following explanatory table might be of service.

A TABLE

EXPLANATORY OF SUNDRY

TECHNICAL LAW TERMS.

ACTION OF DETINUE, lies againſt one who *detains* and refuſeth to deliver things which were put into his hands to keep.

Action of trover and converſion, (from *trouver*, to find) lies againſt a perſon who having found another's goods refuſeth to deliver them upon demand, but *converts* them to his own uſe. The fact of *finding* however, is immaterial; but the plaintiff for form's ſake, muſt lay that he loſt the goods and that the defendant found them.

Action popular, an action given *to the people* in general, as where forfeitures are given at large to any perſon who will ſue for the ſame.

Some times one part is given to the commonwealth or to ſome public uſe, and the other part to the informer or proſecutor, and then it is called a *qui tam* action, becauſe it is brought by a perſon *qui tam*,—that is, *who as well* ſues for the commonwealth *as* for himſelf.

Action of raviſhment, is given to a guardian for the recovery of his ward, when *ſtolen or raviſhed away* from him.

Abate (from *abatre*) to break down, deſtroy, or overthrow.

Ad quod damnum, is a writ directing the ſheriff to enquire *what damages* will be ſuſtained by certain acts.

Affidavit, an oath in writing, ſworn before a perſon who has authority to take it.

Affirm, to ratify or confirm a former judgment.

Alimony is that allowance which a married woman is entitled to upon any occaſional ſeparation from her huſband.

Alias a ſecond or *another* writ, which iſſues after a firſt has been ſued out without effect. It is likewiſe uſed for *otherwiſe called*, where a perſon goes by more than one name.

Alibi, in another place.

Amercement was the pecuniary puniſhment of an offender againſt the king that was found to have offended and to ſtand at the mercy of the king.

Array is the ranking or ſetting forth of a jury. To *challenge* the array of the panel is at once to except againſt all the perſons arrayed or impanneled, on account of partiality, &c.

Arreſt of judgment—to move an arreſt of judgment, is to ſhew cauſe, why judgment ſhould be ſtayed notwithſtanding a verdict given.

Arſon is a malicious and intentional burning of another's houſe.

Aſſault, a violent injury offered to a man's perſon, which may be committed by offering a blow or by a terrifying ſpeech.

Aſſets (French *aſſez* i. e. *ſatis* enough) ſignifies good *enough* to diſcharge the burthen which is caſt upon the executor or heir in ſatisfying the debts and legacies of the teſtator or anceſtor.

Aſſumpſit is taken for a voluntary promiſe, expreſs or implied; by which a man aſſumes or takes upon him to perform or pay any thing to another.

Attach is to take or apprehend in obedience to a writ or precept.

Attachment, is an apprehenſion of a man by his body, or the taking poſſeſſion of his goods, to bring him to anſwer the action of the plaintiff.

Attaint is a writ that lyeth in certain caſes, after judgment againſt a jury that hath given a falſe verdict.

Attainted is a word uſed particularly for ſuch as are found guilty of ſome crime, and especially of treaſon or felony. Anciently a perſon attainted of high treaſon forfeited his lands, &c. his blood was corrupted and he and his poſterity rendered baſe.

Audite querela (the complaint being heard) is a writ that lies where ſince a judgment given good matters of diſcharge have happened and where a man hath any thing to plead, but hath not a day in court to plead it.

Averment (from th French *averer* to verify) is an offer of the defendant to make good or juſtify an exception pleaded in abatement or bar of the plaintiff's action, and it ſignifies the act as well as the offer.

Autre droit is where perſons ſue or are ſued in *another's right*.

Auterfois acquit is a plea of a criminal that he was *heretofore acquitted* of the ſame crime.

Bailiwick (a word taken from the French, whoſe territory was divided into bailiwicks as that of England is into counties) is frequently uſed for county.

Baron hath various ſignifications. It is taken for a degree of nobility next to viſcount. In ancient records it included all the nobility of England. Formerly likewiſe, all men were ſtiled barons.

Baron & feme, huſband and wife, who in law are one perſon, ſo that neither can be a witneſs for or againſt the other; except in caſe of high treaſon.

Bigamy is having more than one huſband or wife at the ſame time.

Committee of idiot—perſons to whom the cuſtody of idiots is entruſted.

Contenement, is that which is neceſſary for the ſupport and maintainance of men, agreeably to their ſtates in life, or the freehold which lies to a man's dwelling houſe, which is in his own occupation.

Curteſy—where a man marries a woman ſeized of an eſtate of inheritance, and has by her iſſue, born alive, which is capable of inheriting her eſtate; he ſhall on the death of his wife hold the lands for his life, as *tenant by the curteſy*.

Coverture is the ſtate and condition of a married woman.

Capias ad reſpondendum is a writ to *take* the defendant and *make him anſwer*.

Capias ad ſatisfaciendum is a writ of execution, commanding the ſheriff *to take* the defendant's body and keep him till *he make ſatisfaction* for the debt and damages.

Capias ut legatum is a writ for apprehending a perſon outlawed.

Capias in withernam is a command to the ſheriff, when goods taken by diſtreſs are taken out of the county or concealed, to take other goods of the diſtrainor in lieu of the diſtreſs formerly taken and *eloigned* or withheld from the owner.

Caveat (let him take care) is a kind of proceſs to ſtop the proving of a will, the granting of the adminiſtration, or the iſſuing a patent for unappropriated land, &c.

Damage feaſant:—*doing damage*.

De bene eſſe:—to take a thing *de bene eſſe*, is to accept it *as well done* for the preſent:—but when it comes to be more fully examined or tried, to ſtand or fall according to the merit of the thing in its own nature. As when a complainant's witneſſes are aged or ſick or going out of the ſtate, ſo that there is danger of their teſtimony being loſt; the court of chancery will order them to be examined *de bene eſſe*, ſo as to be valid, if they cannot be examined afterwards:—but if they live, or return after anſwer; thoſe depoſitions are not to be of force, for the witneſſes muſt be re-examined.

De novo—*anew*,—over again.

Dedimus poteſtatum (we have given the power) is a writ giving authority to examine witneſſes, &c.

Diſtringas is a writ commanding the ſheriff to diſtrain one by his goods and chattels, to enforce his compliance with what is required of him, as for his appearance in court, &c.

Elegit, (a latin word ſignifying *he hath choſen*) is a writ in execution, ſo called becauſe it is *in the choice* of the plaintiff whether he will ſue out this or another writ. It is a writ given either upon a judgment for debt and damages, or upon the forfeiture of a recognizance, by which the defendants goods and chattels are not ſold, but only appraiſed, and all of them (except oxen and beaſts of the plow) are delivered to the plaintiff, at ſuch reaſonable appraiſement and price, in part ſatisfaction of his debt If the goods are not ſufficient; then the moiety or one half of his freehold lands, are alſo to be delivered to the plaintiff, till out of the rent and profits thereof, the debt be levied.

Emblements (from *emblavence de bled*, i. e. corn ſprung or put up above ground) ſignifying properly the profit of land ſown, or more largely, any products that naturally ariſe from the ground, as graſs, grain, fruits, &c.

Eſſoin ſignifies an *excuſe* for him that is ſummoned to appear and anſwer to an action, &c. by reaſon of ſickneſs, or other juſt cauſe of abſence.

Eſtrepement is the making of any deſtruction by a tenant for life upon his lands or woods, or drawing away the heart of the ground by inceſſant plowing and ſowing, without good huſbandry.

Exigent or *exegi facias*, is a writ where the defendant in an action perſonal cannot be found, nor any thing of his within the county. It directs the ſheriff to proclaim and call him five county court days, one after another, requiring him to appear, upon pain of out-lawry. If he come not at the laſt day; he is ſaid to be *quinquies exactus* or *five times required* and is out lawed.

Ex officio—by virtue of his office.

Extent ſignifies a writ or commiſſion to the ſheriff for the valuing of lands or tenements

Fee ſimple. A tenant in fee ſimple, is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever, generally, abſolutely and ſimply, without mentioning *what* heirs but referring that to his own pleaſure or to the diſpoſition of the law.

Fee tail or fee conditional, is a fee reſtrained to ſome *particular heirs*, to the excluſion of others.

Feme covert, a married woman.

Feme ſole, a ſingle woman.

Fieri facias (literally, *that you cauſe to be made*) is a writ com-

manding the sheriff to levy the debt and damage recovered, out of the goods and chattels of the defendant.

Forma pauperis (in the character of a poor man) A person who cannot bear the usual charges of a suit may upon his making oath that he is not worth £ 5. be admitted to sue without paying any fees to an attorney or clerk.

Formedon, from the words *forma donationis*, i. e. *by the form of a gift*, which words occur in a writ which is used on the death of a tenant in tail who had conveyed his right to a stranger, which writ is to enable the heir to recover his land.

Garnishment (from *garnier* to instruct or inform) is a warning given to one for his appearance.

Garnishee is a third person or party in whose hands money is attached; and is so called because he hath had garnishment or warning not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit.

Habeas corpus (i. e. *that you have the body*) a writ, so called from those words being used in it,—directing that the body of him who is imprisoned be brought before the court or a judge thereof, with the cause of his detention.

Habere facias seisin, is a writ directing the sheriff *to give the seisin* of a freehold estate, recovered in a court of justice.

Habere facias possessionem is a writ for *giving the possession* of an estate for years.

Hereditaments signify all such immovable things as a man may have to him and his heirs by way of inheritance.

Homicide is the killing of a man.

Hotch pot (from the French) is a confused mingling of divers things together; but by a metaphor it is a blending or mixing of lands given in marriage with other lands in fee falling by descent. By the custom of London it is used, where the children of a freeman are to have an equal share of one third part of his personal estate.

Hue and cry, is a pursuit of one who hath committed felony from town to town, till he is taken; which all persons who are present where a felony is committed or a dangerous wound given, are bound to raise against the offenders.

Jeofail (from the French *j'ay faille* i. e. I have erred) signifies an oversight in pleading or other law proceedings, which being acknowledged by the pleader, he is permitted by the statutes of jeofails, to amend it.

Imparlance (from the French *parler* to speak) is a petition in court for a day to consider, what answer the defendant shall make to the action of the plaintiff.

Injunction is a prohibition granted in divers cases to suspend farther proceedings.

Inquisition, is a manner of proceeding by way of ſearch or examination.

Interlocutory order, is that which decides not the cauſe, but only ſome incidental matter, which happens between the beginning and end of it.

Joint tenants, are thoſe that hold lands or tenements jointly by one title.

Jointure is a ſettlement of lands and tenements made to a woman in conſideration of marriage, or a covenant whereby the husband or ſome friend of his aſſureth them to her for life.

Levant et couchant, is a term uſed with reſpect to cattle which have been ſo long on the ground of another, that they have *lain down* and *risen again* to feed.

Levari facias, is a writ for levying a ſum of money on a man's lands and tenements, goods and chattels, who has forfeited his recognizance.

Livery of ſeisin is a delivery of poſſeſſion of lands, tenements and hereditaments, unto one that hath a right to the ſame.

Mainpernors are thoſe perſons to whom a man is delivered out of cuſtody or priſon, or thoſe becoming bound for his appearing.

Mainprize is the taking of a perſon into friendly cuſtody, who otherwiſe might be committed to priſon, upon ſecurity being given that he ſhall be forthcoming at the time and place appointed.

Maintainors are thoſe who maintain or ſecond a cauſe depending between others, by money, intereſt, &c.

Mandamus, (i. e. *we command*) is a command iſſuing from a ſuperior court, and directed to any perſon, corporation or inferior court of judicature, requiring them to do ſome particular thing therein ſpecified, which appertains to their office and duty.

Medietas linguæ ſignifies a jury of which one half conſiſts of citizens and the other of ſtrangers.

Mese ſignifies *expences*. It has another ſignification when applied to a writ of right, in connection with which it has the ſame meaning as the word *iſſue* in all other actions.

Mittimus, (i. e. *we have sent*) is the name of a precept from a juſtice to a gaoler on ſending an offender to him for ſafe keeping, and likewiſe of a writ for ſending records from one court to another.

Monſtrans de droit, is a ſhewing of right, and ſignifies a writ to be reſtored to lands and tenements, that are a man's in right, though found to be in the poſſeſſion of one lately dead.

Mortgage is a pawn of lands or tenements, &c. formerly borrowed, to be the creditor's forever, if the money be not repaid on the day agreed.

Meſne proceſs is that which iſſues whilſt a ſuit is depending upon ſome interlocutory matter, as to ſummon juries, witneſſes &c. It alſo ſignifies ſuch proceſs as intervenes between the beginning and end of a ſuit.

Ne exeat is a writ to reſtrain a perſon from *going out* of the ſtate.

Nihil dicit, (i. e. *he ſays nothing*) is a failing by the defendant to anſwer to the plaintiff's plea by the day aſſigned.

Nil debet, is a plea to an action of debt, ſignifying *he owes nothing*.

Nolle proſequi, ſignifies that the plaintiff is *unwilling to proſecute* the ſuit.

Non aſſumpſit, is a plea in perſonal actions, denying that any *promiſe was made*.

Non compos mentis, is not being of *a ſound mind*, memory and underſtanding.

Non eſt culpabilis is a plea ſignifying *that he is not culpable*—that the fact charged is not true.

Non eſt factum, is a plea on an action on a bond or deed that it *was not executed*.

Non eſt inventus, is the return of a ſheriff on a writ when the defendant *was not found* in his county.

Non ſuit, is the letting of a ſuit or action fall.

Non ſum informatus, is the anſwer of an attorney when *he is not informed or inſtructed* to ſay any thing material in defence of his client.

Nul tiel record—there is no ſuch record.

Nuncupative will, a will by word of mouth, before a ſufficient number of witneſſes.

Onas probandi—the burthen of proving.

Oyer and terminer, is a commiſſion *to hear and determine* all treaſons, felonies, &c.

Pain fort et dure, is an eſpecial puniſhment formerly inflicted on thoſe who ſtood mute.

Parceners: where a perſon ſeized in fee ſimple or fee tail dies, and his next heirs are two or more females, they all inherit as co-heirs—and are called *pareeners* or *co-parceners*. So where and deſcends as gavelkind, to all the males in equal degree, as ſons, brothers, uncles, &c. they are parceners.

Poſſe commitatus, the power of the county, including all above the age of 15, who are able to travel.

Pluries, a writ iſſued in the third place after the two former have been diſobeyed.

Poſthumous, is where a child is born after the death of his father.

Precipe quad reddat, is the form of a writ which extends as well to a writ of right as to other writs of entry or poſſeſſion.

beginning with *precipe*, &c. i. e. *command* A. *that he render to* B. &c.

Procedendo, is a writ *sending a cauſe back again* to an inferior court,

Prochein amy—the next friend.

Quantum meruit (i. e. *how much he hath deserved.*) It is an action of the caſe, grounded on the promiſe of another to pay him for doing any thing ſo much as he ſhonld deſerve.

Replevin is a remedy granted upon a diſtreſs, being a redeliverance of the thing diſtrained, to the firſt poſſeſſor, on ſecurity or *pledges*, according to the Engliſh law, being given by him to try the right with the diſtrainor and to anſwer him in a court of law.

Seiſin ſignifies *poſſeſſion*, and *to ſeize* is to take poſſeſſion.

Subpœna is a proceſs to cauſe witneſſes to appear and give teſtimony, under a penalty for diſobedience.

Subpœna duces tecum, is a proceſs to compel a witneſs to bring with him ſome writing or other evidence, neceſſary to be produced in the cauſe.

Superſedeas, is a writ for ſtaying proceedings at law, on good cauſe ſhewn.

Scire facias is a writ commanding the ſheriff to *cauſe it to be made known* to a defendant againſt whom judgment has been given, that he muſt appear on a certain day and ſhew cauſe why execution ought not to iſſue.

Teſtatum is a writ in perſonal actions, after the ſheriff has certified that the defendant is not in the county, upon which this writ is ſent into any other county where he is thought to be, or to have wherewith to ſatisfy,

Teſte is a word uſed in the laſt part of writs wherein the date is contained.

Venire, is either a ſummons to cauſe the party *to come* and anſwer an indictment or preſentment, or the proceſs directed to the ſheriff to cauſe a jury to appear.

Voir dire—to ſpeak the truth—to make true anſwer to ſuch queſtions as the court ſhall propoſe.

TREASON.

TREASON against the United States, says the federal constitution, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

The following acts have been adjudged to amount to the offence of *levying war* against a state.

1. Attacking the forces of the state, in opposition to its authority, upon a march or in quarters.

2. Holding a castle or fort against the state or its forces, if actual force be used in order to keep possession.

3. Listing and marching are sufficient overt acts, without coming to a battle or action, and there may be a levying of war when there is no actual fighting. An assembly armed and arrayed in a warlike manner, for any treasonable purpose is a war levied though not a war actually commenced.

4. An attempt by intimidation and violence to force the repeal of a law, is a levying of war.

5. Every insurrection which in judgment of law is intended to displace or imprison the chief magistrate or to oblige him to alter his measures of government, or to remove evil counsellors from about him, will amount to a levying of war.

(For an illustration of these general principles, and for the authorities on which they are advanced I must refer the reader to my "Review of the criminal common law." Vol. 1. p. 375, &c.

The punishment of treason against the United States is death.

WARRANT.

A GOOD deal having been already said relating to warrants, under the head of ARREST and COMMITMENT, it is needless to enter into any full discussion of the subject in this place. A few general remarks will be sufficient.

1. The margin of the warrant at least should shew the county in which it was issued.

2. It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name who is no officer: for the justice may authorise any one to be his officer, whom he pleases to make such. It is most adviseable however, to direct it to the constable of the precinct wherein it is to be executed, for that no other constable, and *a fortiori* no private person is compellable to serve it.

3. A warrant may be in the name of the territory, and yet the teste must be under the name of the justice who grants it; or it may be styled or made only in the name of the justice; or it may be without any style, and only under the teste of the justice or only subscribed by him.

In this "Assistant" we have adopted the first mentioned mode, as most conformable with the style required in the process issuing from the courts of justice.

Warrant for debt.

Wilkinson County. } The Mississippi Territory of the United States, to the constable of in the said county.

Whereas A. B. hath complained before J. P. esquire, one of our justices of the peace for the said county, that D. E. of in the said county, planter, is justly indebted to him the said A. B. in the sum of by bond (note, or account, &c. as the case may be) and delays

payment thereof; these are therefore to command you to take the body of the said D. E. if to be found in the said county, and to bring him before the said J. P. esquire, at in the said county, on the day of next, to answer the said complaint, when and where do you return how you have executed this warrant. Given under the hand and seal of the said J. P. at in the said county, on the day of in the year of our Lord .

WIFE.

A WIFE or feme covert, as she is stiled in law is so much favoured in respect of that power and authority which her husband has over her that she shall not suffer any punishment for committing a bare theft in company with or by coertion of her husband. But if she commit a theft of her own voluntary act or by the bare command of her husband, or be guilty of treason, murder or robbery in company with or by coertion of her husband; she is punishable as much as if she were a single woman. And the coercion of the husband is only a presumption till the contrary appear; for if upon the evidence it can be established, that the wife was not drawn to it by the husband, but that she was the principle actor and incitor of it; she seems to be guilty as well as the husband.

A wife shall not be deemed an accessary to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her.

A wife may be indicted with her husband and condemned to the pillory with him for keeping a bawdy house.

She shall answer as much as if she were unmar-

ried for any offence not capital. But if a wife incur the forfeiture of a penal statute; the husband may be made a party to an action or information for the same (as he may generally to any suit for a cause of action given by his wife) and shall be liable to answer what shall be recovered thereupon.

Husband and wife cannot be witnesses for or against each other, except in cases of outrageous personal violence, offered by one to the other: but they may mutually demand surety of the peace against each other.

A wife cannot be bound herself by recognizance, but her sureties only.

WILL.

THE following form is in pretty general use, though no particular form of words is legally necessary.

In the name of God, Amen.—I A. B. of being of sound and perfect mind and memory (blessed be God) do this day of in the year of our Lord , make and publish this my last will and testament, in manner following, that is to say,

First, I give and bequeath to &c.

Secondly, I give and bequeath to &c.

And I hereby make and ordain my worthy friend C. D. executor of this my last will and testament. In witness whereof, I the said A. B. have to this my last will and testament set my hand and seal the day and year above written. A. B. [Seal.]

Signed, sealed, published and declared by the said A. B. the testator in the presence of us, who were present at the time of signing and sealing

hereof and attested by us in the presence of the devisor

E. F.
G. H.
I. K.

N. B. Where lands are devised there must be hree witnesses.

ADVERTISEMENT.

WHERE the acts of the Mississippi territory are full and explicit on any subjects, it was considered as altogether unnecessary to introduce those subjects into the Magistrate's assistant. Our statutes are not so numerous, but that any part of them can be easily referred to, and the manner in which they are now published will greatly facilitate such reference. The general guide which has been followed in selecting subjects for the assistant, is Dr. Burn's Justice of the peace and parish officer: but many other books have been used in making the compilation; the principal of which are Hawkins' pleas of the Crown,—Easts' crown law.—Fosters discoveries—Gilberts' law of evidence, by Loft,—Blackstone's Commentaries—Haywoods auty and office of Justice of the peace, and some other books referred to in the course of the work.

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